JOINT APPENDIX OF THE PARTIES

Supreme Court, U. S.
FILED
DEC 1 1975
R., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

FEDERAL POWER COMMISSION,

Petitioner

—*v.*—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners

—*v.*—

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JUNE 20, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

FEDERAL POWER COMMISSION,

Petitioner

—*v.*—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners

—*v.*—

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONTENTS

	Page
Relevant Docket Entries	1
Opinion Below	*
Judgment Below	*

---

* Opinion and Judgment Below were printed as Appendices A and B of the Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in No. 74-1619 and as Appendices D and E of the cross-petition for a Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit in No. 74-1608.

CONTENTS

Page

The National Association for the Advancement of Colored People, *et al.* Petition to the Federal Power Commission for the Issuance of a Rule Requiring Equal Employment Opportunity and Nondiscrimination in the Employment Practices of its Regulatees, filed 6/22/75 3

Federal Power Commission, Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Employment Practices, Docket No. R-447, issued 7/11/72 54

The National Association for the Advancement of Colored People, *et al.* Petition to the Federal Power Commission for Rehearing, filed 8/8/72 83

Federal Power Commission Order Denying Petition for Rehearing, issued 8/21/72 90

Order Allowing Certiorari, dated October 14, 1975, *NAACP, et al.*, v. *F.P.C.*, No. 74-1608, and consolidating with No. 74-1619 93

Order Allowing Certiorari, dated October 14, 1975, *F.P.C.* v. *NAACP, et al.*, No. 74-1619, and consolidating with No. 74-1608 94

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
10-12-72	4-Petition for review of an order of the Federal Power Commission (m-12)
11-15-72	Order per CJ Bazelon that the briefing schedule is set as follows in this case: Petitioners' brief shall be filed by January 15, 1973; respondent's brief shall be filed by March 1, 1973; Petitioners' reply brief, if any, shall be filed by March 15, 1973; the appendix of the parties shall be filed by March 29, 1973
11-20-72	Certified Index to Record (n-3)
1-16-73	Order per CJ Bazelon that the motion of petitioner's to extend time is granted and the briefing schedule in this matter is revised as follows; petitioner's brief shall be filed by January 29, 1973; respondent's brief shall be filed by March 15, 1973; petitioner's reply brief, if any, shall be filed by March 29, 1973 and the joint appendix of the parties shall be filed by April 12, 1973
1-29-73	25-petitioners' brief
1-29-73	25-Brief of Amicus Curiae Equal Employment Opportunity Commission (m-29)
3-16-73	25-Respondent's brief (m-15)
4-12-73	7-Joint appendix
(B) 4-27-73	Per Curiam order denying petitioner' motion for expedited hearing; Tamm and Robb; CJ
(G) 10-15-73	4-Alternative motions of the U.S. Equal Employment Opportunity Commission to present oral argument in this case (m-12)

DATE	FILINGS—PROCEEDINGS

(B) 10-23-73 Clerk's order denying in part motion of United States Equal Employment Opportunity Commission to present oral argument or to share time with petitioners at oral argument, further ordered by the Court that that portion of the aforesaid motion requesting leave to share time with petitioners is granted to the extent agreed to by petitioners

(M) 10-29-73 Argued before CJ Bazelon; McGowan and MacKinnon, JJ; On motion by William L. Taylor Howard A. Glickstein a member of the bar of the Court of Appeals for New York was allowed to argue pro hac vice for petitioners

2-5-75 Opinion for the Court filed by Circuit Judge McGowan.

2-5-75 Judgment vacating Commissions order and remand case. (n)

(G) 5-6-75 Letter from Clerk, Supreme Court extending time to file petition for writ of certiorari to June 20, 1975 in S.C. #A-922

(K) 6-24-75 Notice from Supreme Court of filing a petition for certiorari in SC #74-1608 on June 20, 1975

(K) 6-24-75 Notice from Supreme Court of filing petition for certiorari in S.C. #74-1619 on June 20, 1975

(K) 10-21-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #74-1619 and the case is consolidated with #74-1608; a total of one hour is allotted for oral argument

(K) 10-21-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #74-1608 and the case is consolidated with #74-1619; a total of one hour is allotted for oral argument

Before the

FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRICT AND GAS UTILITY INDUSTRY

PETITION

of

The National Association for the Advancement of Colored People

The National Urban League

The Mexican American Legal Defense and Educational Fund

The National Organization for Women

The Women's Equity Action League

The League of United Latin American Citizens (in California)

The Association for the Betterment of Black Edison Employees

The Office of Communications of the United Church of Christ

The Center for Community Change

The American G.I. Forum (in California)

The Mexican American Political Association

United Native Americans, Inc.

Come now the above named petitioners and, pursuant to subsection (b) of section 1.7 of title 18 of the Code of Federal Regulations and subsection (e) of section 553 of title 5 of the United States Code, petition the FEDERAL POWER COMMISSION for the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees.

1. WHEREAS, The Federal Power Commission has jurisdiction over this matter pursuant to Section 309 of the Federal Power Act, 16 U.S.C. 825h, and Section 16 of the Natural Gas Act, 15 U.S.C. 717o;

2. WHEREAS, the above named petitioners are all organizations representing the interests of black, Spanish surnamed, native and female Americans and are dedicated to the achievement of equal opportunity and the advancement of civil rights (The interest of the above named petitioners is more fully set forth in the attached statement);

3. WHEREAS, natural gas companies are subject to regulation by the Federal Power Commission pursuant to the Natural Gas Act, 15 U.S.C. 717 et seq., and hydroelectric projects and electric public utilities are subject to regulation by the Federal Power Commission pursuant to the Federal Power Act, 16 U.S.C. 719) et seq.;

4. WHEREAS, employment discrimination on a nationwide basis exists in the electric and gas utility industry, comprising natural gas companies, hydroelectric projects and electric public utilities (Statistical evidence of the extent of such employment discrimination is more fully set forth in the attached statement);

5. WHEREAS, such discrimination has resulted in the near exclusion of members of minority groups and females from the better and higher paying jobs in the electric and gas utility industry (Statistical evidence of such exclusion is more fully set forth in the attached statement);

6. WHEREAS, such discrimination violates the following laws: (1) Title VII of the Civil Rights Act of 1964, as amended; (2) the Civil Rights Act of 1866; (3) the Equal Pay Act of 1963; (4) Executive Orders 11246 and 11375; (5) the Fifth Amendment to the United States Constitution; (6) the national policy of protection of the public interest in the operations of the electric and gas utility industry, 15 U.S.C. 717(a) and 16 U.S.C. 824(a); (7) the legislative proscriptions against undue disadvantage and prejudice in the operations of the electric and gas utility industry, 15 U.S.C. 717c(b) and 16 U.S.C. 842d(b), and (8) the fair employment practices acts of more than thirty states;

7. WHEREAS, other Federal regulatory agencies have exercised jurisdiction over discrimination in the employment practices of their regulatees and still others have indicated their intention to do so (These actions and indications of intent are more fully set forth in the attached statement);

8. WHEREAS, the Federal Power Commission has already exercised jurisdiction over racial, ethnic and sex discrimination in the operations of the electric industry as they affect public accommodations (This action by the Commission is more fully set forth in the attached statement) AND

9. WHEREAS, the Federal Power Commission has both the jurisdiction and the duty under the provisions of the Fifth Amendment to the United States Constitution to prohibit employment discrimination in the operations of its regulatees (This duty is more fully set forth in the attached statement),

NOW, THEREFORE, the Petitioners respectfully pray the Commission to:

(1) Prescribe regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees (A proposed rule is attached);

(2) Set public hearings and permit oral argument on such proposed rule;

(3) Initiate a notice and comment rulemaking proceeding with respect to such proposed rule; AND

(4) Grant such other relief as it deems necessary.

RESPECTFULLY SUBMITTED,

PETITIONERS,

by _____
William L. Taylor

by _____
Raymond B. Marcin
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

THEIR ATTORNEYS

Of Counsel:

Robert Gnaizda
Albert Moreno
Public Advocates, Inc.
433 Turk Street
San Francisco, California 94102

Reuben B. Robertson III
P.O. Box 19367
Washington, D.C. 20036

Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

MEMORANDUM IN SUPPORT OF THE PETITION AND PROPOSED RULE

TABLE OF CONTENTS

Page

Part I *BACKGROUND*

EARLY NEGRO EMPLOYMENT IN THE ELECTRIC AND GAS UTILITY INDUSTRY .....

THE ELECTRIC AND GAS UTILITY INDUSTRY TODAY .....

JOB OPPORTUNITIES IN THE GAS AND ELECTRIC UTILITY INDUSTRY .....

Part II *EVIDENCE OF DISCRIMINATION*

STATISTICAL EVIDENCE REVEALS A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY .....

A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY IS REFLECTED IN NUMBERS OF PENDING CASES .....

Part III *LEGAL ARGUMENT*

THERE IS A NATIONAL POLICY AGAINST EMPLOYMENT DISCRIMINATION .....

THE FEDERAL POWER AND NATURAL GAS ACTS .....

STATISTICAL EVIDENCE OF UNDERUTILIZATION OF MINORITIES AND WOMEN ESTABLISHES A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION .....

THE FEDERAL POWER COMMISSION HAS AMPLE AUTHORITY TO ISSUE REGULATIONS BARRING EMPLOYMENT DISCRIMINATION BY ITS REGULATEES .....

THE FIFTH AMENDMENT REQUIRES THE FEDERAL POWER COMMISSION TO ASSURE NONDISCRIMINATION IN THE EMPLOYMENT PRACTICES OF ITS REGULATEES .....

THE FEDERAL POWER COMMISSION HAS PROHIBITED ITS LICENSEES FROM DISCRIMINATING ON ACCOUNT OF RACE, COLOR, SEX, RELIGIOUS CREED AND NATIONAL ORIGIN IN PUBLIC ACCOMMODATIONS .....

OTHER FEDERAL REGULATORY AGENCIES HAVE EXERCISED JURISDICTION OVER EMPLOYMENT DISCRIMINATION .....

Part I. BACKGROUND

EARLY NEGRO EMPLOYMENT IN THE ELECTRIC AND GAS UTILITY INDUSTRY

Employment statistics in the electric and gas utility industry were not broken down according to race prior to 1920. Racial statistics for the industry were first published in that year and were limited to the labor and operative classifications. 8.3 per cent of the unskilled and semi-skilled employees in the electric utility industry and 12.8 per cent of the unskilled and semi-skilled employees in the gas pipeline industry were Negroes in 1920. By 1930, however, the percentages had fallen to 6.5 and 10.8, respectively. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES, (1970), p. 66].

Beginning in 1930, census figures were published which covered all electric and gas utility industry employees. In 1930, Negro employment amounted to 2.6 per cent in the electric power and 5.0 per cent in the gas and pipeline industry. In 1940, the figures were 2.0 and 3.7 per cent respectively, in 1950, 3.0 and 4.9 per cent, and in 1960 3.3 and 3.9 per cent. Between 1930 and 1960, then, Negro employment in the electric utility industry increased by seventh-tenths of a per cent, while during the same period in the gas and pipeline industry it decreased by 1.1 per cent. [Id., p. 76]. Overall, using combined figures for the electric power and gas and pipeline industry, Negro employment rose from 3.3 per cent in 1930 to 3.5 per cent in 1960, an increase of less than two-tenths of one per cent in thirty years. More precisely, Negroes held 3.32 per cent of all jobs in the electric and gas utility industry in 1930. By 1940 Negro representation in the industry had been reduced to 2.32 per cent. By 1950 Negro employment was 3.41 per cent, and from 1950 to 1960 there was only a negligible increase to 3.46 per cent.

1930 Census records clearly reveal that those Negroes who were employed in the electric and gas utility industry were at the bottom of the ladder in terms of job

desirability. Thus, although Negroes held only 3.3 per cent of all jobs in the industry, they held fully 14.2 per cent of the unskilled laborer jobs, 16.8 per cent of the charwomen jobs and 36 per cent of the janitor and porter jobs. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970); p. 70, 71].

THE ELECTRIC AND GAS UTILITY INDUSTRY TODAY

Although the gas industry is the nation's oldest public utility, it does not seem to have experienced rapid growth until the years following World War II. However, between 1945 and 1967, the nation's total gas supply increased 410 per cent, the number of gas customers increased 95 per cent and the miles of distribution gas main increased 168 per cent. During the same period, the operating revenues of investor-owned gas companies increased 800 per cent. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970); p. 38]. Today the FPC lists jurisdiction over more than 123 natural gas pipeline companies, 66 of which have operating revenues of $2½ million or more. [Federal Power Commission, STATISTICS OF INTERSTATE NATURAL GAS PIPELINE COMPANIES (1970)].

In contrast to the gas industry which grew rapidly only in the postwar period, the electric industry has experienced a long period of uninterrupted growth since early in the twentieth century. By 1968 sales of electric energy by investor owned electric utilities reached 1,105 billion kilowatt-hours and revenues totalled $19.4 billion. Today 98.8 per cent of all dwelling units in the United States have electric service, and the average home has 10 electric appliances. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970), p. 16, 19]. The FPC lists 594 publicly owned and 212 privately owned electric utilities. [Federal Power Commission, STATISTICS OF PUBLICLY OWNED ELECTRIC UTILITIES IN THE UNITED STATES (1969) and STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES (1969)].

JOB OPPORTUNITIES IN THE GAS AND ELECTRIC UTILITY INDUSTRY

As the numbers and wealth of member companies indicate, the electric and gas utility industry is, today, a fertile source of employment opportunity.

The Bureau of the Census listed 634,000 jobs in the industry in 1970, with 285,000 in electric companies and systems, 162,000 in gas companies and systems and 187,000 in combination companies and systems. Of these 545,000 are production workers with an average hourly wage of $4.21 in electric companies and systems, $3.82 in gas companies and systems and $4.52 in combination companies and systems. [U.S. Dept. of Commerce, Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES (1971), p. 221].

Of the blue collar or physical workers in the industry, fully sixty per cent are craftsmen (skilled) with an average hourly wage of $4.67. Operatives (semiskilled) comprise eleven per cent of the blue collar force and earn an average of $3.95 an hour. Laborers constitute thirteen per cent and earn $3.38 an hour on the average. Service workers, who comprise four per cent of the blue collar force earn the least—$2.91 an hour on the average. In addition ten per cent of the clerical workers are classified as blue collar by the Bureau of Labor Statistics (Meter readers and stock clerks) and they average $3.65 an hour. [Robinson, OCCUPATIONS IN THE GAS AND ELECTRIC UTILITIES INDUSTRY; Research Studies Division, Equal Employment Opportunity Commission; appendix B].

Job opportunities in the blue collar fields of the electric and gas utilities industry are, according to an EEOC study, greater than in other industries:

> Basically, a high school graduate begins in a low skill, entry level job, usually as a helper or laborer, and through on-the-job training masters the higher skills of a craft position. Generally, the most important of the plant positions are filled from within by workers who have started at the bottom. The op-

> portunities for advancement in this industry are potentially greater than in other industries because, with a heavy dependence on in-house training and the uniqueness of the skills required in this industry, relatively few workers are able to transfer skills acquired in other industries into high skill, high level craft jobs in this industry. [*Id.*, at p. 17].

Because of the specialized skills required in the blue collar occupations in the industry, employment in that area would seem to afford relatively stable and secure positions.

In the white collar field, in which the average hourly wage is $3.10, stenographers, secretaries and typists account for more than two-fifths of the jobs. Another fifth are accounting clerks and one-tenth are cashiers. [*Id.*, p. 5]. Of the clerical positions studied by EEOC, none was an occupation peculiar to the electric and gas utilities industry. [*Ibid.*] This is in contrast to the blue collar jobs which, as indicated above, involved relatively unique skills. Clerical work in the electric and gas utilities industry, then, would seem to afford opportunities to learn marketable skills, thus enlarging one's employment mobility. The converse of this, of course, is true; i.e. basic clerical skills learned in other industries are transferable to the electric and gas utility industry.

Part II. EVIDENCE OF DISCRIMINATION

STATISTICAL EVIDENCE REVEALS A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY

In March of 1971 the Bureau of Labor Statistics of the United States Department of Labor (BLS) listed 633,600 people working in the electric and gas utility industry. [U.S. Dept. of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS; March, 1971].

I. The United States Equal Employment Opportunity Commission (EEOC), using data aggregated from its

1970 EEO-1 Reports covering eighty-six per cent of all people working in the industry, placed the electric and gas utility industry at the very bottom of its list of all major industries with respect to BLACK employment participation. The following table illustrates EEOC's finding:

PARTICIPATION RATES OF BLACK WORKERS IN INDUSTRY GROUPS REPORTING 500,000 OR MORE EMPLOYEES, 1970

Industry	Participation Rates of Black Workers
Medical Services	15.9
Miscellaneous Business Services	14.7
Primary Metals	13.2
Textiles	13.7
Food and Kindred Products	13.0
Transportation Equipment	11.0
Apparel	10.8
Educational Services	10.3
Fabricated Metal Products	10.0
Paper and Allied Products	9.6
Communication	9.0
Banking	8.8
Chemicals and Allied Products	8.6
Trucking and Warehousing	8.3
Wholesale Trade	8.2
Food	8.1
Electrical Machinery, Equipment and Supplies	8.1
Railroads	7.8
Insurance	7.6
Retail Trade	7.1
Printing and Publishing	6.4
Non-electrical Machinery	6.4
Utilities	6.1

[Thomas, EMPLOYMENT PATTERNS IN THE GAS AND ELECTRIC INDUSTRIES: Research Report No. 35, November 1971; Equal Employment Opportunity Commission; p. 10]

The low participation of black workers in the electric and gas utility industry is placed in keener focus when measured against the 10.1 per cent all industries record

of black participation. A further breakdown of the 6.1 per cent into job categories reveals that blacks are concentrated in the low paying, less desirable positions in the industry:

> While the overall participation rate for black workers was strikingly low, the situation was even worse for black workers in white-collar employment. Less than 4 percent of all white-collar workers were black and four out of every five of these were office and clerical workers. Further examination of the industry's statistical profile on employment reveals that less than one percent of its 105,000 officials, managers and professionals are black. [*Id.*, p. 11]

Black workers are concentrated in the blue collar jobs in the industry, and, even there, they seem to occupy the bottom rung of the ladder of desirability:

> Twenty-six percent of the laborers are black, eighteen percent of the operatives are black and three percent of the craftsmen are black. [*Id.*, p. 12]

The following table illustrates the 1970 participation rate of black employees in the electric and gas utility industry and compares that rate with the all-industries black participation rate:

	Blacks	
	Utilities	All Industries
Total	6.1	10.1
White Collar	3.7	4.7
Officials and Managers	0.6	1.9
Professionals	1.0	2.5
Technicians	2.1	6.2
Salesworkers	1.3	4.3
Office and Clerical	7.0	7.2
Blue Collar	7.3	13.1
Craftsmen	2.5	5.6
Operatives	10.3	14.1
Laborers	25.8	21.8
Service Workers	33.2	26.3

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

It is true that overall black participation in the industry has increased from 3.7 per cent six years ago to the present 6.1 per cent. EEOC, however, assigns the increases to the lower paying, less prestigious office and clerical job category, with negligible increases in the more desirable categories and a decline in the numbers of black craftsmen.

II. SPANISH SURNAMED AMERICANS have a 1.6 per cent participation rate in the electric and gas utility industry. This figure is placed in proper focus when measured against the fact that Spanish Americans constitute five per cent of the total population and between four and five per cent of the civilian labor force. Spanish surnamed Americans are also concentrated in the low paying, less desirable positions in the industry.

> They hold only 1.4 percent of the white collar positions and two out of every three of these are office and clerical jobs. Spanish Surnamed Americans hold less than 1.0 percent of the official, managerial and sales positions. One and one-half percent of all technicians are Spanish Surnamed Americans.
>
> Spanish Surnamed Americans fare slightly better in the blue-collar occupations, but the difference is so slight that it is hardly worth mentioning. The electric and gas utilities have a blue-collar workforce that is 1.9 percent Spanish Surnamed American. This compares to a national figure for all industries of 4.9 percent. [*Id.*, p. 15, 16] •

The following table illustrates the 1970 participation rate of Spanish surnamed American employees in the electric and gas utility industry and compares that rate with the all-industries Spanish surnamed American participation rate:

	SSA's	
	Utilities	All Industries
All Employees	1.6	3.6
White Collar	1.4	1.9
Officials and Managers	.5	1.0
Professionals	.9	1.1
Technicians	1.5	2.2
Sales Workers	.5	2.1
Office and Clericals	2.1	2.6
Blue Collar	1.9	4.9
Craftsmen	1.2	3.0
Operatives	2.6	4.6
Laborers	3.7	8.5
Service Workers	2.9	5.9

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

III. The participation rate for WOMEN in the electric and gas utility industry is strikingly low:

> Women constitute slightly more than half of the total population, thirty-eight percent of the labor force and 14.8 percent of the workforce of the gas and electric utilities. Women appear to have been denied blue-collar jobs outright, and their participation in the higher level of white collar jobs is minimal. [*Id.*, p. 18]

The following table illustrates 1970 male and female occupation distribution in the electric and gas utility industry:

OCCUPATIONAL DISTRIBUTION BY SEX
(PERCENTAGE)

	Male	Female
All Occupations	100.0	100.0
White Collar	42.4	95.1
Officials and Managers	13.8	1.3
Professionals	8.1	2.5
Technicians	7.5	1.5
Sales	2.4	1.8
Office and Clerical	10.4	87.9
Blue Collar	55.5	2.1
Craftsmen	31.1	.3
Operatives	19.5	1.4
Laborers	4.8	.4
Service Workers	2.0	2.9

[*Id.*, p. 19]

The following table illustrates the 1970 participation rate of female employees in the electric and gas utility industry and compares that rate with the all-industries female participation rate:

Occupational Distribution of Female Workers

	Utilities	All Industries
All Employees	100.0	100.0
White Collar	95.1	60.1
Officials and Managers	1.3	2.6
Professionals	2.5	5.9
Technicians	1.5	3.3
Sales Workers	1.8	10.0
Office and Clericals	87.9	38.0
Blue Collar	2.1	29.9
Craftsmen	0.3	2.7
Operatives	1.4	19.9
Laborers	0.4	7.3
Service Workers	2.9	10.0

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

Although the numbers of blacks and Spanish surnamed Americans in the industry increased between 1966 and

1970, the numbers of women in the industry actually declined in the same period. [*Id.*, p. 18].

IV. While the above national figures and percentages clearly reveal the existence of a nationwide problem of employment discrimination in the electric and gas utility industry, an analysis of various LOCAL LABOR MARKET COMPARISONS can serve to bring the nature and extent of the problem into sharper focus. The following tables illustrate 1970 black and Spanish surnamed American participation in the gas and electric utility industry in many of the nation's metropolitan areas:

BLACK EMPLOYMENT IN THE UTILITIES INDUSTRY FOR SELECTED STANDARD METROPOLITAN STATISTICAL AREAS

	Percent Black		
SMSA	Population 1970	Employment All Industries	Employment Utilities Industry
Atlanta	22.3	16.4	11.5
Beaumont	21.4	12.8	13.1
Birmingham	29.5	22.8	13.5
Chicago	17.6	15.1	7.6
Dallas	24.9	11.8	6.1
Detroit	18.0	16.8	6.6
Fort Worth	10.9	9.2	6.1
Houston	19.3	14.2	7.5
Indianapolis	12.4	9.4	4.0
Jackson, Mississippi	37.2	26.6	7.3
Kansas City	12.1	10.4	4.8
Miami	15.0	11.5	4.3
New Orleans	31.0	21.5	12.7
New York	16.3	12.3	9.7
Newark	18.8	12.5	6.0
Orlando	14.6	10.8	3.4
Philadelphia	17.5	14.6	7.3
St. Louis	16.0	12.9	4.7
Shereveport	32.8	24.8	5.4
Tampa	10.8	10.6	6.5
Washington, D.C.	24.6	23.4	20.9
Wilmington	21.2	9.7	2.4

SOURCES: Preliminary figures, U.S. Department of Commerce, Bureau of the Census. Data aggregated from 1970 EEO-1 reports. [*Id.*, p. 22]

SPANISH SURNAMED AMERICAN EMPLOYMENT IN THE UTILITIES INDUSTRY FOR SELECTED STANDARD METROPOLITAN STATISTICAL AREAS

SMSA [Note: 1970 Population percentages for Spanish Surnamed Americans were not yet available from Census data]	Percent Spanish Surnamed American Employment	
	All Industries	Utilities Industry
Beaumont	1.7	0.4
Chicago	4.9	0.4
Dallas	4.1	3.9
Forth Worth	4.3	5.9
Houston	6.3	2.1
Miami	17.1	4.3
New Orleans	3.2	0.3
New York	7.2	3.0
Newark	3.9	0.8
Tampa	4.4	3.4

SOURCE: Data aggregated from 1970 EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, p. 23]

V. In November, 1971, EEOC issued A POSITION PAPER ON THE SELECTION OF THE ELECTRIC AND GAS UTILITIES INDUSTRY AS THE SUBJECT FOR A PUBLIC HEARING HELD BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. The above data were summarized on pages 5, 6 and 7 of that paper:

1. The black participation rate in this industry is the lowest (6.1%) among the twenty-three industries reporting employment of 500,000 or more.

2. One-third of all utility establishments filing EEO-1 reports with the Commission in 1970 had no black employees.

3. In only three of twenty large SMSAs (standard metropolitan statistical areas) did the black participation rate in utilities approach or exceed the participation rate for all industries in the area. In 8 of the same 20 SMSAs, the all-industry black participation rate was at least double the black participation rate in local utilities.

4. In 1970, Spanish Surnamed Americans held 3.6 percent of all jobs reported in the EEO-1 nationwide survey, but they held only 1.6 percent of all jobs in the utilities industry.

5. Spanish Surnamed Americans held less than 1 percent of the official, managerial, professional and sales jobs and only 1.5 percent of all technicians jobs.

6. In many SMSAs Spanish Surnamed Americans have relatively low participation rates in the utilities industry when compared to their participation rate in all industries in the local labor market. Most striking in this kind of comparison is the city of Chicago where Spanish Surnamed Americans held 0.4 percent of the jobs in the gas and electric utilities at the same time that they held approximately 5 percent of all jobs in the Chicago area.

7. While women held 34% of the positions reported in EEOC's overall survey in 1970, only 15% of this industry's employees were female.

8. Nine of every ten females employed in this industry were clerical workers.

9. Less than 2% of the blue collar jobs were held by women.

The above statistics confirm that a national problem of underutilization of black, Spanish surnamed and female Americans exists in the electric and gas utility industry.

A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY IS REFLECTED IN NUMBERS OF PENDING CASES

Statistical evidence is one of the most important methods of guaging the extent of the problem of employment discrimination in the electric and gas utility industry. An additional measure of the problem can be obtained by examining the numbers and diversity of pending

cases involving charges of discrimination. The following is a compilation of cases involving allegations of employment discrimination pending against electric or gas utility companies before state fair employment practices commissions:

Oklahoma—Investigations are pending in cases filed with the Oklahoma Human Rights Commission against the National Gas Pipeline Company (HRC 81-72; 12/18/71; sex) and the Western Electric Company (HRC 90-72; 12/9/71; sex and HRC 12-72; 1/24/72; race or color).

Wisconsin—The Wisconsin Department of Industry, Labor and Human Relations lists three cases presently pending against utilities: 321 R 138,412 R 180 and 417 R 183. All of the cases involve allege racial discrimination and they were filed in August and December, 1971.

West Virginia—The West Virginia Human Rights Commission is currently processing two cases against power companies (E 174-71; May 14, 1971; race) and (E 140-71; October 8, 1971; race).

Disrict of Columbia—The District of Columbia Office of Human Rights has three presently pending complaints against electric or gas utilities, two against PEPCO (PP-872; October 16, 1970; race, creed, color, national origin and sex) and (PE-1255; January 6, 1972; race) and one against the Washington Gas Light Company (PP-970; January 27, 1971; race, creed, color, national origin and sex). In addition, the former complaint against PEPCO and the complaint against the Washington Gas Light Company are of a systematic or class nature.

New York—The State of New York's Division of Human Rights has three presently pending complaints of discrimination concerned with the electric and gas utility industry, two against the Niagara Mohawk Power Corporation (CC-20112-70; 1/30/70; race and national origin) and (C-21946-70; 9/15/70; national origin) and one against the N.Y. State Electric and Gas Corporation (CS-25561-71; 11/8/71; sex). In addition,

the former complaint against the Niagara Mohawk Power Corporation is of a class nature.

Washington—The Washington State Board Against Discrimination has a complaint of a class nature pending against the Snohomish County Public Utility District (ES-1529; August 31, 1971; race and sex).

California—The California Fair Employment Practice Commission has a number of cases pending against the City of Los Angeles Dept. of Water and Power (FEP 70-71-B6768; 4/22/71; race), (FEP 70-71-B6824; 5/6/71; race), (FEP 70-71-B-6944; 6/10/71; national origin), (FEP 70-71-B1-1013; 6/30/71; race), (FEP 71-72-B7-004; 7/2/71; race), (FEP 71-72-B7-053; 7/19/71; race), (FEP 71-72-B7-070s; 7/22/71; sex), (FEP 71-72-B7-071s; 7/22/71; sex), (FEP 71-72-B7-097s; 8/3/71; sex), (FEP 71-72-B7-188; 9/3/71; race), (FEP 71-72-B7-370s; 11/11/71; sex), (FEP 71-72-B7-424; 12/2/71; race), (FEP 71-72-B7-590; 2/24/72; race), (FEP 71-72-B7-596s; 2/25/72; sex) and (FEP 71-72-B7-605s; 2/28/72; sex); four against the Southern California Edison Company (FEP 70-71-B6935; 6/8/71; race), (FEP 70-71-B6995; 6/25/71; race), (FEP 71-72-B7-328; 10/28/71; race), (FEP 71-72-B7-337; 11/2/71; race); two against the Pacific Gas and Electric Company (FEP 71-72-A7-396; 2/9/72; race) and (FEP 71-72-A7324; 12/29/71; race), and one against the Southern California Gas Company (FEP 71-72-B7-439; 12/14/71; race). In addition, a staff investigation recently resulted in charges of discrimination against minorities and women in the employment practices of the Southern California Edison Company, the Pacific Gas and Electric Company and the Western Pacific Railroad Company. (The Wall Street Journal; Friday, March 3, 1972).

New Jersey—The New Jersey Department of Law and Public Safety's Division on Civil Rights lists several complaints pending against electric and gas utilities: Against the Public Service Electric Company—(AG14-NB-0365; 8/3/71; national origin); against the Public Service Electric and Gas Company—(AG09RB-0402; 11/9/71; race), (AG14RB-0403; 11/10/71; race), (AG14RB-0404; 11/10/71; race), (AG14SB-0405; 11/

10/71; sex), (AG14RB-0406; 11/10/71; race), (E09BW-5610; 4/2/71; multiple), (EG14SB-6351; 12/27/71; sex) and EL11RB-6377; 1/4/72; race), against the New Jersey Natural Gas Company—(XN03WB-0046; 8/6/71; multiple), and against the A.C. Electric Company—(XA02BW-0050; 8/6/71; multiple).

Colorado—The Colorado Civil Rights Commission has two pending complaints on file against the Public Service Company of Colorado, (E-58[70-72]; 8/4/71; race) and (E-432[71-72]; 1/24/72; open class). The latter, as is indicated, is of a class nature.

Kansas—The Kansas Commission on Civil Rights has two cases pending against the Kansas Gas and Electric Company (E90-72W; 12/13/71; race) and E93-72W; 1/12/72; race).

Missouri—The Missouri Commission on Human Rights lists complaints pending against the Gas Service Company (E-9/91-3103; 9/20/71; race/color); against Western Electric (E-9/71-3095(F); 9/13/71; race/color), (E-1/71-2524(F); 1/29/71; race/color), (E-2/71-2574 (F); 2/18/71; race/color), (E-6/71-2877(F); 6/4/71; sex), (E-7/71-2998(F); 7/27/71; race/color), (E-12/71-3381(F), 12/10/71; race/color), (E-2/72-3510; 2/3/72; sex) and (E-2/72-3537(F); 2/10/72; race/color), and against Union Electric (E-4/71-2808; 4/29/71; race/color), (E-1/72-3441; 1/12/72; race/color), (E-1/72-3442; 1/12/72; sex), (E-2/72-3532; 2/10/72; ancestry), (E-2/72-3607(F); 2/8/72; sex) and (E-2/72-3612(F); 2/8/72; national origin).

Indiana—The Indiana Civil Rights Commission has cases pending against the Indiana Gas Co. (1983; 12/16/71; race); the Citizens Gas Co. (1892; 11/27/71; race) and the Indiana and Michigan Electric Co. (2267; 3/7/72; race).

Part III. LEGAL ARGUMENT

THERE IS A NATIONAL POLICY AGAINST EMPLOYMENT DISCRIMINATION

There is a national policy against discrimination in employment on the basis of race, color, religion, sex or

national origin. This policy is particularly embodied in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), and Executive Orders 11246 and 11375 (42 U.S.C. 2000e). In addition to Federal requirements, employment discrimination on the grounds of race, color, religion and national origin is outlawed under the statutes of more than thirty States. [Alas. Stat. §§ 18.80.010, -.30, §§ 23.10.192 (Supp. 1966); Ariz. Rev. Stat. Ann. §§ 41-1401, -1485 (Supp. 1965); Cal. Labor Code Ann. §§ 1410-32 (1964); Colo. Rev. Stat. §§ 80-21-1, -8 (1963); Conn. Gen. Stat. Ann. §§ 31-126, -128 (1960); D.C. Police Regs. art. 47 (1965); Hawaii Rev. Laws §§ 90A-1, -9 (Supp. 1965); Ill. Rev. Stat. ch. 48, §§ 851-66 (1963); Ind. Stat. Ann. §§ 40-2307, -2317 (1965); ch. 121 (1965) Iowa Laws 195; Kan. Gen. Stat. Ann. §§ 44-1001, -1041 (Supp. 1961); ch. 2, (1966) Ky. Acts; Md. Ann. Code art. 49B, §§ 1-19 (Supp. 1965); Mass. Ann. Laws ch. 6 § 56 (Supp. 1966), ch. 151B (1966); Mich. Stat. Ann. § 17.458 (1960); Minn. Stat. Ann. §§ 363.01, .13 (1966); Mo. Rev. Stat. §§ 296.010, 070 (Supp. 1965); ch. 276 (1965) Neb. Laws 782; N.H. Rev. Stat. Ann. §§ 354A:1, :14 (1966); N.J. Rev. Stat. 1937, § 18:25-1, -28 (Supp. 1966); N.M. Stat. Ann. §§ 59-4-1, -14 (1960); N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1966); Ohio Rev. Code Ann. §§ 4112.01, .99 (Page 1965); Ore. Rev. Stat. §§ 659.010, .115 § 659.990 (1965); Pa. Stat. Ann. tit. 43 §§ 951-63 (1964); R.I. Gen. Laws §§ 28-5-1, -39 (1956); ch. 6, (1965) Utah Laws 173; Wash. Rev. Code §§ 49.60.010, .320 (1962); W. Va. Code ch. 5, art. 11; Wis. Stat. Ann. §§ 111.31, 37 (Supp. 1967); ch. 170, (1965) Wyo. Laws 445.]

THE FEDERAL POWER AND NATURAL GAS ACTS

The primary mission of the FPC is to safeguard the *public interest* by regulating the businesses of interstate wholesale sales of electrical energy and natural gas. The FPC's regulatory mandate extends to matters relating to the transmission and sale of electric energy and natural gas *interstate commerce.*

> It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [Section 201 of the Federal Power Act; 49 Stat. 847; 16 U.S.C. 824(a)]
>
> . . . [I]t is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [Section 1(a) of the Natural Gas Act; 52 Stat. 821 (1938); 15 U.S.C. 717(a)].

With respect to natural gas companies, the FPC furthers its public interest mandate by requiring that companies which transport or sell natural gas or undertake constructions or extensions of facilities secure *certificates of public convenience and necessity.* [Section 7(c) of the Natural Gas Act; 15 U.S.C. 717f(c)].

With respect to electric companies, the FPC furthers its public interest mandate by *licensing* hydroelectric plants. [Section 4 of the Federal Power Act; 16 U.S.C. 797(e)].

In addition, natural gas companies may not abandon any of their facilities or any service rendered by means of facilities subject to the FPC's jurisdiction unless the FPC gives its approval. FPC approval is by law premised, inter alia, upon public convenience or necessity. [Section 7(b) of the Natural Gas Act; 15 U.S.C. 717f (b)].

Electric companies under FPC jurisdiction may not sell, lease or otherwise dispose of their major facilities or merge their major facilities with those of any other person or purchase, acquire or take any security of any other public utility unless the FPC issues an order authorizing them to do so. FPC authorization is by law premised, inter alia, upon the public interest. [Section 203(a) and (b) of the Federal Power Act; 16 U.S.C. 824b(a) and (b)].

Finally, the FPC, of course, regulates the rates which may be charged by natural gas and electric companies. [See Section 5 of the Natural Gas Act; 15 U.S.C. 717d and Section 206 of the Federal Power Act; 16 U.S.C. 824e].

Both natural gas companies and electric companies under FPC jurisdiction are prohibited by law from making or granting any undue preference or advantage to any person and from subjecting any person to any undue prejudice or disadvantage, with respect to interstate wholesale sales of electricity or natural gas. [See Section 4(b) of the Natural Gas Act; 15 U.S.C. 717c(b) and Section 205(b) of the Federal Power Act; 16 U.S.C. 824d(b)].

STATISTICAL EVIDENCE OF UNDERUTILIZATION OF MINORITIES AND WOMEN ESTABLISHES A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

> In the problem of racial discrimination, statistics often tell much and the Courts listen. [*State of Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir. 1962), affirmed 371 U.S. 37 (1962)]

Courts have often held statistical disparities in the utilization of minorities to establish a prima facie case of employment discrimination.

> We hold as a matter of law that these statistics which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the

Civil Rights Act of 1964. [*Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970)]

The United States Supreme Court relied on statistics to find unlawful employment discrimination in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, n. 6 (1971). See also the following cases which rely on statistics in establishing employment discrimination: *United States* v. *Hayes International Corporation*, 415 F. 2d 1038, 1040, 1043 (5th Cir. 1969). *United States* v. *Virginia Electric and Power Company*, 3 FEP Cases 529 (E.D. Va. 1971). *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (10th Cir. 1970). *United States* v. *Georgia Power Company*, 3 FEP Cases 321, 322 (N.D. Ga. 1970). *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505, 508 (E.D. Va., 1968). *United States* v. *Sheet Metal Workers*, 416 F. 2d 123, 127, n. 7 (8th Cir. 1969). *Irvin* v. *Mohawk Rubber Company*, 308 F. Supp. 152 (E.D. Ark. 1970).

The above cases and others have developed the proposition that a substantial statistical dispartity establishes, prima facie, a case of employment discrimination. The employment statistics in the electric and gas utility industry as a whole evince sufficient disparity to establish such a case on an industrywide, nationwide basis.

THE FEDERAL POWER COMMISSION HAS AMPLE AUTHORITY TO ISSUE REGULATIONS BARRING EMPLOYMENT DISCRIMINATION BY ITS REGULATEES

On September 17, 1971, the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department, in a letter to the General Counsel of the Federal Power Commission, held that the Federal Power Commission has clear authority to issue regulations barring employment discrimination by natural gas companies regulated by the Commission and by electric companies holding hydroelectric plant licenses and arguable authority with respect to electric companies whose whole-

sale interstate rates are regulated but which have no hydroelectric licenses. [LETTER from David L. Norman, Assistant Attorney General, Civil Rights Division, to Mr. Gordon Gooch, General Counsel, Federal Power Commission; September 17, 1971].

After noting that the Federal Communications Commission had issued equal employment regulations and that the Interstate Commerce Commission was presently considering doing so, Mr. Norman went on to provide the legal bases for the Justice Department's opinion:

> 1. In determining whether to grant a certificate of public convenience and necessity under the Natural Gas Act, the Commission is invested with discretion, *California Gas Producers Ass'n.* v. *FPC*, 383 F.2d 645 (C.A. 9, 1967) and must evaluate all factors bearing on the public interest. *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1963); *Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378 (1959). Such factors include matters of fundamental national policy, *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956); *National Coal Ass'n* v. *FPC*, 191 F.2d 462 (C.A.D.C., 1951); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1963); *Consolidated Edison Co.* v. *FPC*, 271 F.2d 942 (C.A. 3, 1959), and the Commission, in making its determination has considered, for instance, government antitrust policy, *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956), national defense concerns, *National Coal Ass'n.* v. *FPC*, 191 F.2d 462 (C.A.D.C., 1951) and air pollution, *Consolidated Edison Co.* v. *FPC*, 271 F.2d 942 (C.A. 3, 1959). Since the elimination of discrimination in employment is a national policy of high priority, [see, e.g., *United States* v. *Gustin-Bacon Div. of Certain-Teed Products Corp.*, 426 F.2d 539 (C.A. 10, 1970)], an applicant's employment policies are relevant to the Commission's determination.
>
> Title VII of the Civil Rights Act of 1964 makes it unlawful for private employers with twenty-five or more employees to engage in employment prac-

tices which discriminate on account of race, color, religion, sex or national origin. In *California* v. *FPC*, 369 U.S. 482 (1961), the Supreme Court held that an applicant's compliance or noncompliance with the laws of the United States is relevant in deciding whether the public convenience and necessity would be served by issuance of a certificate to a company engaged in the production or transmission of natural gas. Thus it seems clear that the FPC may consider a company's employment policies in making a decision concerning the issuance of certificates. Correlatively, under 16 U.S.C. § 717f(e) the Commission may issue a regulation requiring regulatees to comply with an equal employment policy as a reasonable term and condition required by the public convenience and necessity. Thus, in our opinion, the Commission has the authority under the Natural Gas Act to issue an equal employment regulation. Cf. Reports and Orders of the Federal Communications Commission, 33 Fed. Reg. 9960 (1968); 34 Fed. Reg. 9284 (1969); 35 Fed. Reg. 8825 (1970).

As a constitutional matter, in analogous situations, courts have held private businesses subject to Fifth and Fourteenth Amendment obligations because of the extensive governmental regulation of their activities. *Public Utilities Comm'n.* v. *Pollak*, 343 U.S. 451 (1952); *Washington Gas Light Co.* v *Virginia Electric Power Co.*, 438 F.2d 248 (C.A. 4, 1971). Further, where the government is a joint participant in an activity with private persons, courts have held that there is an affirmative obligation on the part of the government to insure compliance with constitutional provisions. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (D. Ohio 1967); *United States* v. *Frazer*, 297 F. Supp. 319 (M.D. Ala. 1969).

2. In our opinion the Commission has the authority under the Federal Power Act to issue equal employment regulations with respect to those companies licensed by the Commission to operate hydroelectric plants.

Electric companies holding licenses to operate hydroelectric plants have been granted an exclusive right to use part of the public domain. *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *Udall* v. *FPC*, 387 U.S. 428 (1967). The license is a privilege granted on the theory that there will be a resulting benefit to the public in the licensee's use of the waters. *Alabama Power Co.* v. *FPC*, 128 F.2d 280 (C.A.D.C.), *cert. denied*, 317 U.S. 652 (1942). The Commission's duty in a licensing case is to explore all issues relevant to the public interest and determine whether the grant of a license is in the public interest. *Udall* v. *FPC*, 387 U.S. 428 (1967). Compliance with public policies of high priority and with legal requirements is relevant in determining what action is in the public interest. *California* v. *FPC*, 369 U.S. 482 (1961); *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956). Under the Commission's statutory power to impose conditions upon the grant of licenses, a power which gives the Commission broad authority to effect the public interest, *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (C.A.D.C., 1967), the Commission may require that electric companies follow nondiscriminatory employment practices. Cf. Reports and Orders of the Federal Communications Commission, 33 Fed. Reg. 9960 (1968); 34 Fed. Reg. 9284 (1969); 35 Fed. Reg. 8825 (1970).

An equal employment regulation may be made applicable to present licensees as well as to applicants seeking a license. In fulfilling a continuing obligation to comply with the Act, a licensee may be required to comply with rules and regulations made subsequent to the issuance of the license. See, e.g., 32 Fed. Reg. 11640 (1967).

3. With respect to electric companies whose wholesale interstate rates are regulated but which have no hydroelectric license, the authority for issuing a regulation regarding equal employment is less clear. As with the companies engaged in natural gas ac-

tivities, the Fourteenth Amendment may apply to these electric companies because of the extensive governmental regulation of their activities, *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952), *Washington Gas Light Co.* v. *Virginia Electric Power Co.*, 438 F.2d 248 (C.A. 4, 1971), but since the companies are regulated primarily by state and local rather than federal authorities, the existence of a duty on the part of the federal government to insure the companies' compliance with its constitutional obligations is unclear. We defer to your judgment and that of the Commission in this matter.

4. In our opinion the Commission has authority to regulate the equal employment practices of pipeline companies and producers and electric companies holding hydroelectric plant licenses, and is not limited to regulating equal employment practices at facilities which are themselves licensed. Pipeline companies and producers must obtain certificates of public convenience and necessity in order to transport or sell natural gas in interstate commerce. Since it is a company that applies for and receives a certificate, and since the Commission's determination is that it is in the public interest for the particular company to engage in the activity, the Commission has authority to regulate the employment activities of the entire company. We would think it proper, however, in the case of large integrated corporations for the Commission, if it sees fit, to limit the application of a regulation to the natural gas subsidiary or the natural gas operations of the corporation. Regarding electric companies holding hydroelectric plant licenses, we believe it would be an unduly narrow interpretation of authority to limit the applicability of an equal employment regulation to licensed facilities. Since an electric company must apply for a license and the Commission, before granting a license, must find it in the public interest for the particular utility company to hold a license, the entire company's equal employment practices may be

regulated. Cf. Exec. Order 11246, § 202, 30 Fed. Reg. 12319 (1965).

5. In reply to your question on FPC's jurisdiction to compel consumers to pay increased rates, Title VII of the Civil Rights Act of 1964 made it unlawful for any employer with twenty-five or more employees to engage in discriminatory employment practices. The companies which you regulate have had equal employment obligations for some time and we see no reason why the promulgation of an equal employment regulation should result in any increase in consumer rates.

6. Concerning the question of termination of services or denial of a license, there are a variety of means of enforcing an equal employment regulation which accommodate both proper implementation of a regulation and your Commission's other responsibilities. See, e.g., Exec. Order 11246, § 209(a), 30 Fed. Reg. 12319 (1965). For instance, where there is competition for a license, the license may be awarded to the company that has demonstrated a willingness to comply with an equal employment policy. Where denial of a license or certificate may have severe adverse effects on the public, the Commission might refer the case to the Department of Justice to compel compliance with the regulation through civil litigation.

In *Potomac Electric Power Co. (PEPCO)* v. *Public Service Commission of the District of Columbia* (C.A. No. 2382-70/2384-70; D.D.C. Feb. 23, 1971), the issue as to whether the Public Service Commission had the authority to examine PEPCO's employment pattern from the point of view of race was raised. On petition from the National Urban League, the Commission ordered PEPCO's rate increase to be conditioned upon its achieving fair employment practices. PEPCO appealed. The United States District Court for the District of Columbia held:

> Because Pepco is a private utility pursuing an essentially governmental function, guaranteed a stated

rate of return on its investment, and regulated in the public interest, the Court concludes that the Commission had authority and power to examine Pepco's employment practices, either as a part of a rate proceeding or as an independent matter. [*Ibid.*]

THE FIFTH AMENDMENT REQUIRES THE FEDERAL POWER COMMISSION TO ASSURE NONDISCRIMINATION IN THE EMPLOYMENT PRACTICES OF ITS REGULATEES

The Justice Department has acknowledged that the Federal Power Commission is clearly *authorized* to issue employment discrimination regulations binding upon its regulatees. Judicial interpretations of the Fifth and Fourteenth Amendments, however, make it clear that federal regulatory agencies such as the FPC are not only *authorized* but also *obliged* to assure nondiscrimination in all aspects of the operations of the industries they regulate, including employment practices. [See U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1971; Legal Appendix, p. 365 et seq.]

That the strictures imposed upon states by virtue of the Equal Protection Clause of the Fourteenth Amendment apply as well to agencies and instrumentalities of the federal government by virtue of the Due Process Clause of the Fifth Amendment has not been seriously doubted since *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, discriminatory practices, which, on the state level, violate the Equal Protection Clause are also prohibited, on the federal level, by the Due Process Clause of the Fifth Amendment. [*Id.*, 499.]

Before delving into the question of the applicability of the constitutional requirement of nondiscrimination to federal regulatory agencies, an analysis of the type of governmental activity or involvement which gives rise to the requirement will be useful. It is clear that discriminatory conduct which is otherwise private and nonaction-

able can run afoul of the Constitution if the government is, to some significant extent, involved. *Burton* v. *Wilmington Parking Authority* 365 U.S. 715 (1961) involved a privately owned restaurant which refused to serve blacks. The restaurant was, however, located in a building which was owned and operated by a State agency. The Supreme Court noted that the state agency had leased the space to the restaurant without requiring the insertion of a nondiscrimination provision in the lease and, accordingly, held the act of discrimination of the restaurant to be violative of the Fourteenth Amendment:

> The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the 14th amendment. [*Id.* at 725.]

The Supreme Court, in the *Burton* case, indicated that what the state agency should have done was to insert a nondiscrimination provision in the lease which it gave to the restaurant. What we are arguing essentially is that the FPC should be inserting a nondiscrimination provision in the license or certificate or permission which it gives to its regulatees.

In *Burton*, the governmental involvement which gave rise to the applicability of the constitutional nondiscrimination requirement was a lease of real property. In other cases such governmental involvement has been found in grants of funds [*Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1965); *United States* v. *Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970)] and grants of tax advantages [*Green* v. *Kennedy*, 309 F. Supp. 1127 (D. D.C. 1970) appeal dismissed 398 U.S. 956 (1970)]. Indeed *Burton* went so far as to indicate that a constitutional violation is established if ". . . to some significant extent the State in *any* of its manifestations has been found to have become involved in [the otherwise private discriminatory conduct]." [*Supra*, at 722]. [Emphasis

supplied]. Similarly, "state support of segregated schools *through any arrangement, management, funds or property* can not be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." [*Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958)] [Emphasis supplied].

It is then evident that many different types of governmental involvement in otherwise private conduct give rise to the constitutional requirement of nondiscrimination. We now reach the question as to whether governmental involvement in the form of federal regulation of private industry gives rise to such requirement.

In 1952, the Supreme Court ruled that a privately owned transit corporation and a privately owned communications corporation which were regulated by a federally created commission were subject to the due process requirements of the Fifth Amendment. [*Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952)].

> In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such Federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the rgulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired thereby. [*Id.*, at 462].

The Public Utilities Commission in *Pollak* had no more extensive involvement with its regulated companies than do the federal regulatory agencies. Indeed the involve-

ment of the Federal Power Commission in the business of the electric and gas utility industry is immense:

> Under its statutory authority the Federal Power Commission (1) issues certificates authorizing natural gas pipelines to construct, extend, acquire or operate transportation and storage facilities for the transportation of natural gas in interstate commerce and for the sale of natural gas in interstate commerce for resale; (2) investigates the need for and, when appropriate, directs pipelines to sell natural gas to local distributors, investigates and regulates the rates, charges, and services for natural gas transported or sold for resale in interstate commerce; (3) authorizes abandonment of facilities or discontinuance of service subject to Commission jurisdiction; (4) promulgates and enforces a uniform system of accounting to assure that natural gas pipelines accurately report their financial position; (5) assures nondiscriminatory transportation and purchase of gas in submerged lands of the Outer Continental Shelf; (6) regulates the rates and services of public utilities selling electricity in interstate commerce at wholesale; (7) issues and administers permits and licenses for the planning, construction and operation of nonfederal hydroelectric projects on waters or lands subject to Federal jurisdiction; (8) promulgates and enforces a uniform system of accounting for interstate public utilities; (9) regulates certain issuance sales of securities by electric public utilities; (10) regulates the merger or consolidation of electric public utilities and their disposition or acquisition of electric facilities; (11) reviews and approves proposed rates for the sale of electric power from certain Federal and international hydroelectric projects; and (12) authorizes the exportation of electricity and natural gas to a foreign country and issues permits for maintaining facilities at international borders for their transmission. Under its rulemaking and regulatory powers, the Federal Power Commission has required the development of

> recreational facilities by its licensees, and provision for use of such facilities on a nondiscriminatory basis. The Commission has also insisted on regulatory safety inspections of facilities. Most other regulations detail the proper forms to use when submitting applications and other requests, or set forth the exact accounting procedures to be followed. [U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1971; p. 368.]

The pervasive presence of the Federal Power Commission in the most vital economic matters which an electric or gas utility company must face—rates, construction of facilities, interstate sales of electricity or gas, financial accounting systems, mergers, consolidations and foreign transactions—satisfies any test of government involvement based on sufficiency of contacts, and, under the rationale of *Burton* and the other cases, raises a duty, on the part of the Federal Power Commission, to assure nondiscrimination in the business practices of its regulatees.

THE FEDERAL POWER COMMISSION HAS PROHIBITED ITS LICENSEES FROM DISCRIMINATING ON ACCOUNT OF RACE, COLOR, SEX, RELIGIOUS CREED AND NATIONAL ORIGIN IN PUBLIC ACCOMMODATIONS

The FPC has prohibited its licensed hydroelectric projects from discriminating on account of race, color, sex, religious creed and national origin in the field of public accommodations:

> The Commission expects the licensee to assume the following responsibilities:
>
> . . .
>
> (g) To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.
>
> [18 CFR 2.7]

> Every licensee maintaining recreation facilities for the use of the public at a licensed project, or employing or permitting any other person to maintain such facilities, shall permit or require such other person to permit, equal and unobstructed use of such facilities to all members of the public without regard to race, color, religious creed or national origin.
>
> [18 CFR 8.3]

Since the FPC has assumed jurisdiction over the issue of racial, ethnic and sex discrimination in the area of public accommodations, it can hardly be heard to deny that it has such jurisdiction in the area of employment. Indeed, its rationale for the adoption of its public accommodation rule applies as well if not a fortiori to the area of employment:

> The courts have repeatedly held that a grant of the use of some part of the public domain to a private operator carries with it, as a matter of constitutional law, an obligation to operate the granted premises in a nondiscriminatory manner. This rule logically applies to the licensing by the Commission of non-Federal hydroelectric projects, and specifically to the recreation facilities provided at such projects. [31 F.R. 8376 (June 15, 1966)].

That such rule also logically applies to the employment practices of licensed hydroelectric projects or certified natural gas companies has been persuasively stated by the United States Commission on Civil Rights [U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT; 1971; p. 365-369].

The statutory authority cited by the FPC for the issuance of its public accommodation regulation is:

> . . . [S]ection 10(a) of the Federal Power Act, which gives the Commission responsibility for insuring the fullest practicable use of the Nation's waterway resources for recreational as well as electric energy and navigation purposes. It cannot seriously

be argued that a limitation of availability based on race, creed, color, or national origin is consistent with such use of project lands and waters for recreation. [32 F.R. 6487 (April 27, 1967)].

The FPC has assumed partial jurisdiction over the field of discrimination in access to public accommodations. There is no reason why it should not assume full jurisdiction over the field of discrimination in access to jobs as well. Further, the FPC has recognized and taken steps to carry out its responsibilities to assure and promote equal employment opportunity within its own personnel practices. [See Remarks of Rep. Wyman; Congressional Record, April 18, 1972, p. E3884].

OTHER FEDERAL REGULATORY AGENCIES HAVE EXERCISED JURISDICTION OVER EMPLOYMENT DISCRIMINATION

Two federal regulatory agencies have exercised jurisdiction over employment discrimination in the industries which they oversee: The Federal Communications Commission, on June 4, 1969, adopted rules requiring equal opportunity in the employment practices of broadcast licensees (34 F.R. 9284) and, on June 5, 1970, broadened those regulations to include an annual employment reporting requirement and a requirement for the preparation of equal opportunity programs to be furnished by regulatees in applications for permits, transfers of control and license renewals (35 F.R. 8825); and on April 27, 1972, the Federal Home Loan Bank Board published a nondiscrimination in employment regulation (37 F.R. 8436).

The FCC took several points into consideration in deciding to exercise jurisdiction over employment discrimination: (1) The FCC noted that it is charged with the responsibility of safeguarding the "public interest, convenience and necessity" in its licensing function, and that in discharging that responsibility, it has the duty of determining whether an applicant has violated the laws of the United States, including the Civil Rights Act. [13

FCC 2d 766, 768, 769]. (2) The FCC noted that there is a national policy against employment discrimination and that the industry which it regulates (broadcasting) is licensed under a public interest standard and must operate in the public interest, and drew the analogy between its observance of the national policy in its licensing function and the Federal government's observance of that policy in its contract award function. [13 FCC 2d 766, 769]. (3) Further, the FCC noted that a broadcast licensee is a public trustee charged with the responsibility of meeting the needs of the public it serves on an equitable basis and that if a licensee is practicing employment discrimination, a clear question is raised as to whether it is making a good faith effort to serve the entire public. [13 FCC 2d 766, 770].

It is clear that each of the above points taken into consideration by the FCC applies as well to the FPC and its regulation of the gas and electric utility industry. (1) The FPC is charged with the responsibility of safeguarding the "public interest" and the "public convenience and necessity" in its regulatory and licensing functions. [See e.g. Sections 201 and 203(a) and (b) of the Federal Power Act; sections 1(a) and 7(b) and (c) of the Natural Gas Act]. (2) Hydroelectric companies and natural gas companies are licensed or certified under a public interest standard and must operate in the public interest. [Section 4 of the Federal Power Act and section 7(c) of the Natural Gas Act]. (3) Electric and gas utility companies are public trustees charged with the responsibility of meeting the needs of the public they serve on an equitable basis. [Section 205(b) of the Federal Power Act and section 4(b) of the Natural Gas Act].

It would seem, then, that the conclusion that the FCC drew with respect to its authority and responsibility over employment discrimination in the broadcast industry would apply as well to the FPC and the electric and gas utility industry.

On December 4, 1969, the FCC extended the coverage of its nondiscrimination in employment regulation to

include telephone company and communications company common carriers, observing that "the same considerations of public policy are applicable to those communication common carriers subject to Commission jurisdiction." [34 F.R. 19200].

The Interstate Commerce Commission, while it has not yet issued a regulation prohibiting employment discrimination, has issued a presently pending notice of proposed rulemaking on the issue of equal opportunity in surface transportation [36 F.R. 10741 (June 2, 1971)].

Finally, the Civil Aeronautics Board has advised the Commission on Civil Rights that it is working on an advance notice of proposed rulemaking concerning the employment practices of its regulatees. [U.S. Commission on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER; November, 1971; p. 178].

Respectfully submitted,

PETITIONERS

by _____

WILLIAM L. TAYLOR

by _____

RAYMOND B. MARCIN

Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

Their Attorneys

Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or natural origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual

with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individaul's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of

qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permission to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall

apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

Respectfully submitted,

PETITIONERS

by _____
WILLIAM L. TAYLOR

by _____
RAYMOND B. MARCIN

Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

Their Attorneys

Before the

FEDERAL POWER COMMISSION

Docket No. ———

EQUAL EMPLOYMENT OPPORTUNITY OF THE ELECTRIC AND GAS UTILITY INDUSTRY

PETITIONERS' STATEMENT OF INTEREST

The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some eighteen hundred active unincorporated branches and approximately 450,000 members throughout the Nation. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizen rights in the United States. To this end its activities have included advocating for civil rights legislation at local, State, and Federal levels. Its executive director is Roy Wilkins and its national headquarters is at 1790 Broadway in New York City.

The NATIONAL URBAN LEAGUE is a professional community service organization committed to securing equal opportunities for Negroes and other minorities in all areas of American life. It has 94 affiliates and five regional offices throughout the Nation. The executive director of the National Urban League is Vernon Jordan and its headquarters are at 55 East 52nd Street in New York City.

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND represents the interests

of Mexican American citizens in cases dealing with discrimination in employment as well as other areas of human activity. It has worked to expand judicial opinions which have dealt with discrimination against Negroes to situations involving denials of rights because of national origin or ethnic background. Its general counsel is Mario Obledo and its National office is at 145 Ninth Street in San Francisco.

The NATIONAL ORGANIZATION FOR WOMEN (NOW) is a civil rights organization founded in 1966 to bring women into full participation in American society. NOW's activities have included advocating for a greater recognition by federal agencies of civil rights responsibilities, including equal employment responsibilities. NOW has more than two hundred chapters and fifteen thousand members throughout the Nation. Its president is Wilma Scott Heide and its National Office is at 1957 East 73rd Street in Chicago.

The WOMEN'S EQUITY ACTION LEAGUE is a civil rights organization for women which seeks to promote greater economic progress on the part of American women, to press for full enforcement of existing antidiscrimination laws in behalf of women, to correct de facto discrimination against women, to investigate instances of and to find solutions to economic, educational, tax, and employment problems affecting women, and to effect a reappraisal of federal, state, and local laws and practices limiting women's employment opportunities. Its president is Arvonne Frazer and its offices are at 1253 4th Street, S.W., in Washington, D.C.

The LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LUNAC) is a Mexican American organization with chapters throughout the southwestern United States, including 55 in California. Among its aims and goals is the assurance of equal employment opportunities for Mexican American citizens. The President of LUNAC is Fidel Gonzales and its headquarters are at 7149 South Tico Vista Road in Tico Rivera, California.

The ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES was organized in the late 1960's by black employees at the Detroit Edison Company. The Association has sought to end racially discriminatory hiring and upgrading practices through meetings with company officials, through the filing of complaints with the Michigan Civil Rights Commission and the United States Equal Employment Opportunity Commission and through litigation in federal court. The offices of the Association are at 19300 Sunset in Detroit, Michigan.

The OFFICE OF COMMUNICATIONS is an instrumentality of the UNITED CHURCH OF CHRIST and conducts a ministry in mass communications. The goals and priorities of the United Church of Christ include the attainment of interracial justice and the elimination of discrimination on account of race and sex. The United Church of Christ has more than two million members throughout the Nation, and its Office of Communications is at 289 Park Avenue South in New York City.

The CENTER FOR COMMUNITY CHANGE is an organization which provides assistance and support to minority and poor community development groups across the country who are attempting to improve their economic conditions. Such groups represent a cross-section of black and Spanish surnamed, urban and rural Americans. The offices of the Center for Community Change are at 1000 Wisconsin Avenue, N.W., in Washington, D.C.

The AMERICAN G.I. FORUM, a California Corporation, was founded in Corpus Christi, Texas, in 1948 to aid Mexican American veterans of World War II in obtaining their G.I. benefits. Since then, the organization has expanded into broader community and civil rights concerns. The American G.I. Forum now has many chapters throughout the southwest including 41 in California alone. Its aims and goals now include the assurance of equal employment opportunities for Mexican American citizens. The President of its California chapter is Frank Galaz and its California headquarters is at 10512 Seventh Avenue in Engelwood.

The MEXICAN AMERICAN POLITICAL ASSOCIATION (MAPA) is a Mexican American organization with chapters throughout the southwestern United States including 50 in California. Among its aims and goals is the assurance of equal employment opportunities for Mexican American citizens. The President of MAPA is Armando Rodriquez and its headquarters are at 3340 East Kerckhoff in Fresno, California.

UNITED NATIVE AMERICANS, INC., is an American Indian organization based in California. Its purposes included securing the civil rights of native American citizens through education, economic development activities and social action. The President of United Native Americans, Inc., is Lee Brightman and its address is P.O. Box 26149 in San Francisco.

Before the

FEDERAL POWER COMMISSION

Docket No. ———

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

VERIFICATION OF PETITION

District of Columbia)
) ss.
City of Washington)

June —, 1972

William L. Taylor, an attorney duly licensed to practice law in the District of Columbia and representing the petitioners herein, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof to be true, except as to matters and things, if any, stated on information and belief, and that, as to those matters and things, he believes them to be true.

WILLIAM L. TAYLOR

Subscribed and sworn to before me this —— day of June, 1972, in the city of Washington, D.C.

Notary Public

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

EMPLOYMENT PRACTICES

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Docket No. R-447

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Educational Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communications of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

OPINION NO. 623

DECLARATORY OPINION AND ORDER ON PETITION FOR ISSUANCE OF A RULE RELATIVE TO EMPLOYMENT PRACTICES

(Issued July 11, 1972)

The petition to which this Opinion is addressed was filed June 22, 1972, and is treated herein as a petition for a declaratory order. See 1.7(c) Federal Power Commission Rules of Practice and Procedure, 18 CFR 1.7(c).

Petitioners raise important issues of policy and law which should be considered through judicial interpretation of regulatory statutes and laws and regulations governing employment practices and equal opportunities. This subject matter has been considered previously by the Commission as it affects statutory provisions which the Federal Power Commission administers. Those Commission determinations have not been challenged on appeal, even though one or more petitioners herein were parties.

Three docketed cases[1] have arisen under the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, in which a number of the underlying legal issues raised in the subject petition were considered. They were resolved by the Commission in a manner consistent with the views set forth in this Opinion and Order. They were presented in arguments raised by certain of the petitioners now before the Commission.

The Commission lacks the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates as natural gas companies, public utilities or licensees, because it lacks the requisite delegation of Congressional

---

[1] *Pacific Gas and Electric Company*, 44 FPC 1365, 1373 (1970), appeals dropped, unreported orders of the Court of Appeals for the Ninth Circuit filed April 26, 1971, and June 22, 1971, *Pacific Gas and Electric Company* v. *Federal Power Commission*, Nos. 71-1027, 71-1028, 71-1453 and 71-1454; and *Virginia Electric and Power Company*, —— FPC ——, order issued August 5, 1971, not appealed.

authority to act in that area. Executive authority and constitutional considerations do not provide the basis for Commission jurisdiction. Simply stated, the Commission is not the designated agency for the administration of equal employment laws or any other type of labor regulation. As pointed out *infra*, regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies.

Where the Commission does have specific responsibilities in the area of equal rights, they are being enforced. These are: (1) as an employer and agency of the Federal Government subject to the requirements of Executive Order No. 11478, August 8, 1969, 34 F.R. 12985; and (2) as the Congressionally delegated agency charged by the Congress with the duty to administer the comprehensive use of resources standard governing hydroelectric licensing under the Federal Power Act, 16 U.S.C. 803(a), i.e., in a manner to insure that multipurpose hydroelectric facilities (e.g., power production, navigation, recreation and other uses), are open to use by all persons upon non-discriminatory bases. Implementing regulations of the Commission are set forth in Federal Power Commission Administrative Order No. 131, Equal Employment Opportunity, issued January 26, 1970, *Administrative Manual*; and Federal Power Commission Order No. 341 Amending Regulations Under the Federal Power Act, Prohibition of Discrimination at Recreational Facilities at Licensed Hydroelectric Projects, issued April 19, 1967, 37 FPC 775 [2].

The Commission is mindful and fully supportive of the National policies of this Nation directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin. The Commission welcomes judicial review and final resolution of the findings and conclusions set forth in this Opinion.

Requested Relief—Petitioners seek a general rulemaking action of the Commission directed to the promulga-

---

[2] Codified Part 8 Commission Regulations under the Federal Power Act, 18 CFR Part 8.

tion of "* * * regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees * * *." Petition, p. 3. Procedurally, petitioners seek public hearings before the Commission, oral argument and a general public rulemaking through notice of a rule[3] and written responses thereto. We deny that request because of the basic conclusions which the Commission has reached relative to the scope of its regulatory authority. As the Commission stated in *Pacific Gas and Electric, supra,* 44 FPC 1368:

> The legal issues, which must be of concern to us in this proceeding, are those over which we have jurisdiction. We do not find the issues raised * * * sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested * * * we do not find it appropriate in the exercise of our general administrative power to order a hearing on ultimate issues which we could not lawfully resolve.

The bases of the Commission's jurisdiction to act in respect to natural gas companies, public utilities and licensees, are statutory: namely, the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, passed in 1920 as the Federal Water Power Act, 41 Stat. 1063, and substantially amended in 1935, 49 Stat. 838; and the Natural Gas Act, 15 U.S.C. 717 *et seq.*, passed in 1938. Other statutes cited by petitioners in support of their claims do not grant jurisdictional authority to this Commission. In our judgment, the Congress has not granted authority under any of these statutes for this agency to act as a remedial forum for the redress of unlawful employment practices.

Discussion of Authorities—Petitioners legal arguments are directed to various sections of the Natural Gas Act, the Federal Power Act, the Civil Rights Act of 1964, as amended, 78 Stat. 241, 42 U.S.C. 1971 *et seq.*, the

---

[3] A proposed rule annexed to the petition is reproduced in Appendix A hereto.

Civil Rights Act of 1866, 14 Stat. 27, the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), Executive Order Nos. 11246 and 11375, the Fifth Amendment to the United States Constitution and the Fair Employment Practices Acts of various states. We consider these *seriatim.*

Referring to the Natural Gas Act and natural gas companies, petitioners cite sections dealing with the Congressional grant of jurisdiction to the Commission to regulate interstate transportation and sale of natural gas for resale in interstate commerce in the public interest, 15 U.S.C. 717(a); the certification of such transactions and facilities therefor of natural gas companies and abandonment thereof as required by the public convenience and necessity, 15 U.S.C. 717f(b)(c); the control of the types of wholesale gas services of natural gas companies and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 15 U.S.C. 717c(b), d; and general administrative procedural authority of the Commission, 15 U.S.C. 717o.

Referring to the Federal Power Act and public utilities and licensees, petitioners cite sections dealing with the Congressional grant of jurisdiction to regulate interstate transmission and sale of electric energy for resale in interstate commerce in the public interest, 16 U.S.C. 824(a); the control of the merger, sale or disposition of jurisdictional properties of public utilities or acquisition of the capital securities thereof as required in the public interest, 16 U.S.C. 824b(a)(b); the control of the types of wholesale or bulk power services of public utilities and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 16 U.S.C. 824d(b), e; the licensing of hydroelectric project works of licensees upon streams over which the Congress has jurisdiction, upon public lands and reservations of the United States and at federally owned dams, 16 U.S.C. 797(e); and the general administrative procedural authority of the Commission, 16 U.S.C. 825h.

Essentially, petitioners argue that public interest considerations enfold the national policies against discrimi-

nation in employment and therefore make their implementation and execution a part of this Commission's regulatory jurisdiction and authority. We can not accept this generalized argument. Application of the public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. As pointed out *infra*, the purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify the ultimate conclusion petitioners draw. We distinguish employment procedures from other subjects such as national defense considerations, antitrust, environmental requirements, navigation, flood control or recreation, all of which are reflected in the Natural Gas and Federal Power Acts. See for example, 15 U.S.C. 717j, 717s(a); and 16 U.S.C. 803(a)(h), 804, 805, 809, 824a(a) and 825j.

Nothing in either of the basic statutes which we administer—the Federal Power Act and the Natural Gas Act—and particularly the sections referenced by petitioners, addresses the matter of employment procedures of natural gas companies, public utilities or licensees, nor does the legislative history of either Act give any basis for believing that Congress intended to confer jurisdiction upon the Commission to regulate those activities. Both statutes are economic regulatory devices born out of economic development and financial conditions which prevailed nationally earlier in this century. The Federal Water Power Act (Part I of the Federal Power Act), is, as its preamble states, "* * * An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto * * * and for other purposes.", 41 Stat. 1063. The Federal Power Act is Title II of the Public Utility Act of 1935, 49 Stat. 838, "An Act To provide for control and regulation of public utility holding companies, and for other

purposes.", 49 Stat. 803. The Natural Gas Act, as its preamble states, is "An Act To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.", 52 Stat. 821.

Constitutional considerations and the inability of individual states to regulate and control multi-state utility operations, i.e., interstate transmissions and wholesale transactions involving electric energy and natural gas were principal factors in the enactment of the Federal Power and Natural Gas Acts. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U.S. 575, 581-83 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525-531 (1945); and *Federal Power Commission* v. *Southern California Edison Company, et al.*, 376 U.S. 205, 213-14 (1964). In short, Congress, through the enactment of these statutes, provided Federal regulation of electric and natural gas services and transactions which are beyond the reach of state public service commission control. See for example, House Report No. 61, on H.R. 3184 (which became the Federal Water Power Act), 66th Cong., 1st Sess., p. 5; Senate Report No. 621, on S. 2796 (which became the Federal Power Act), 74th Cong., 1st Sess., pp. 3, 17-18, 22; and House Report No. 709 on H.R. 6586 (which became the Natural Gas Act), 75th Cong., 1st Sess., pp. 1-3.

The consumer and services and prices for electric and gas utility services were focal points of Congressional concern in the enactment of both statutes. See *Pennsylvania Water & Power Co. et al.* v. *Federal Power Commission et al.*, 343 U.S. 414, 418 (1952) "A major purpose of the whole Act is to protect power consumers against excessive prices * * *."; *Atlantic Refining Co., et al.* v. *Public Service Company of New York, et al.*, 360 U.S. 378, 388 (1959), "the [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."; and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., et al.*, 365 U.S. 1, 19

(1961) "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies'."

It is in the context of these considerations that we reject petitioners' broad public interest arguments. The public interest concept does not provide the basis for this Commission to regulate employment procedures of natural gas companies, public utilities or licensees; any more than the public interest would have us regulate the securities, taxes, the patents, the safety, the wages and hours, the advertising or any other of a number of areas which Congress has created specialized agencies to regulate, including equal employment opportunities. The Natural Gas and Federal Power Acts do not admit of such interpretation.

Congress has acted in the area of labor law and equal employment opportunity protection. See, for example, 29 U.S.C. Chapters 1-15, and in particular, Chapter 2. Women's Bureau, Chapter 4B. Federal Employment Service, Chapter 5. Labor Disputes, Mediation and Injunctive Relief, Chapter 6. Jurisdiction of Courts in Matters Affecting Employer and Employee, Chapter 7. Labor-Management Relations, Chapter 8. Fair Labor Standards, Chapter 9. Portal to Portal Pay, Chapter 11. Labor-Management Reporting and Disclosure Procedure, Chapter 12. Department of Labor, Chapter 14. Age Discrimination in Employment, and Chapter 15, Occupational Safety and Health; the Civil Rights Act of 1964, 78 Stat. 241; the Equal Pay Act of 1963, 77 Stat. 56; and the Equal Employment Opportunity Act of 1972, 86 Stat. 103.[4] In no instance did the Congress

---

[4] *Cf.* the Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 42 U.S.C. 1981-1982, Equal rights under the law, Property rights of citizens.

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

specify administrative duties for this Commission in these areas.

The basic statute of concern in light of petitioners' arguments, is the Civil Rights Acts of 1964, as amended, including the Equal Employment Opportunity Act of 1972. As pointed out in the Opinion of the Supreme Court, *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 429-31 (1971), "The objective of Congress in the enactment of Title VII [Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification." Title VII of that Act, 78 Stat. 253, 42 U.S.C. 2000e, establishes the Equal Employment Opportunity Commission to administer those provisions. That Act specifies the actions which constitute unlawful employment practices, 42 U.S.C. 2000e-2, -3 [5]. Investigatory authority is conferred upon the EEOC, including examination of witnesses and production of evidence with provision for judicial enforcement of investigatory determinations, 42 U.S.C. 2000e-5, -8, -9. The EEOC may prescribe procedural regulations pursuant to the require-

---

shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of exery kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[5] Among the proscribed conduct are "* * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * * or * * * to limit, segregate, or clarify * * * to deprive any individual of employment opportunities or otherwise adversly affect * * * status as an employee, because of such individual's race, color, religion, sex, or national origin", 42 U.S.C. 2000e-2(a)(1)(2).

ment of the Administrative Procedure Act, 42 U.S.C. 2000e-12. It may direct the keeping of records relevant to employment practices and enforcement of the Civil Rights Act, subject to the statutory provision that information so obtained by the EEOC shall not be made public by it prior to the initiation of any proceeding involving such information, 42 U.S.C. 2000e-8. Its investigation of claimed violations of Title VII, by statute, are not public without the written consent of the parties and may not be used as evidence in any subsequent proceeding, 42 U.S.C. 2000e-5(a). The Act provides for mediation and conciliation measures leading to voluntary compliance measures by the EEOC, 42 U.S.C. 2000e-5 (a). Private persons aggrieved have recourse to the courts with injunctive and equitable remedies, together with court appointed counsel, 42 U.S.C. 2000e-5(e). The Act also provides for civil enforcement actions by the Attorney General, 42 U.S.C. 2000e-6, -5()e).

Pursuant to the 1972 amendments, the coverage of Title VII provisions are extended to certain state and local government authorities and private employers with 15 or more persons and private and public educational institutions, 86 Stat. 103, 42 U.S.C. 2000e.

The power of the EEOC is extended "* * * to prevent any person from engaging in any [equal opportunity] unlawful employment practices * * *", 86 Stat. 104, 42 U.S.C. 2000e-5. The EEOC is required to serve notice of charges, which, by statute, are not to be made public by the Commission; to investigate the same, according "* * * substantial weight to final findings and orders made by state or local authorities in proceedings commenced under State or local law * * *"; and to endeavor to mediate or conciliate controversies which have reasonable cause, or otherwise to dismiss the charge. The EEOC is to defer, initially, to state or local agencies having jurisdiction in the premises under an exhaustion of remedies principle. Where the EEOC is unable to mediate or conciliate, it may bring a civil action in the Federal courts in pursuit of equitable remedies or affirmative relief. Where the respondent party is a governmental authority, the Act provides for initiation of

such court actions by the Attorney General. The EEOC and the Attorney General are also authorized to seek temporary judicial relief. The party aggrieved may also initiate court action under certain conditions, may seek court appointed counsel and may intervene in actions initiated by the EEOC or the Attorney General. The Equal Employment Opportunity Act of 1972 provides for transfer of these functions of the Attorney General to the EEOC effective in 1974.

The 1972 amendments confer upon the EEOC, in connection with its hearings and investigations, the powers of National Labor Relations Act, 29 U.S.C. 161, 86 Stat. 109, 42 U.S.C. 2000e-9. The type of investigatory rulemaking which petitioners seek before this Commission is within the authority of the EEOC to effectuate. Indeed, that agency's established reporting requirements appear to comprehend essentially the type of information which petitioners seek to assemble through this agency. The amendments provide for a Presidentially appointed general counsel of the EEOC with the * * * responsibility for the conduct of litigation as provided in Sections 706 and 707 [42 U.S.C. 2000e-5, -6] of this title.", 86 Stat. 110, 42 U.S.C. 2000e-4. In the enactment of the 1972 revisions to the Civil Rights Act of 1964, the Congress considered and rejected a provision whereby recognized remedies for enforcement of equal rights and labor practices, would be pre-empted. See, United States Code Congressional and Administrative News, 92nd Cong., 2nd Sess., No. 3, pp. 1049-50, 1022, 1043-44. Congress clearly evidenced its intention regarding the enforcement of equal rights, including its intention in respect to administrative actions dealing with equal employment opportunities. The Civil Rights Act, as amended, does not specify that all departments and agencies are to undertake the administration or implementation thereof. When the Congress wishes to accomplish that result, it so states. See, National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4332, 4333.

The 1972 amendments establish an Equal Employment Opportunity Coordinating Council with "* * * responsi-

bility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. * * *", 86 Stat. 111. The Council is comprised of the Attorney General, Secretary of Labor, and the Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission.

The Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), cited by petitioners, is a part of the Fair Labor Standards Act of 1938, enforced by the Wage and Hour and Public Contracts Divisions of the Labor Department, not the Federal Power Commission. That Act's provisions are directed to wage differentials based upon sex. As such, the coverage, of this Act is more restrictive than the Civil Rights Act's prohibition of discrimination based upon sex, the latter extending to areas other than wage discrimination. Criminal and civil actions may ensue in enforcement of the Fair Labor Standards Act.

Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, as amended by Executive Order No. 11375, October 13, 1967, 32 F.R. 14303, implements the "* * * program of equal employment opportunity in Government employment, employment by Federal contractors and sub-contractors and employment under federally assisted construction contracts * * *", regardless of sex, race, creed, color, or national origin, 3 CFR 685. As recognized in these orders, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, enunciates the national policy of equal opportunity in private employment, and Title VI, 78 Stat. 252, is specifically directed to non-discrimination in federally financially assisted programs. The Secretary of Labor is the designated administering officer of Parts II and III of Executive Order No. 11246, which relate to Government contractors, sub-contractors, and federally assisted programs. Executive Order No. 11247, September 24, 1965, 30 F.R. 12327, assigns coordinating

function responsibilities to the Attorney General in respect to Title VI matters. The Secretary of Labor, by Order No. 15-68, August 8, 1968, 33 F.R. 12600, assigned the responsibility under Executive Order No. 11246, to the Office of Federal Contract Compliance.[6]

Order No. 1, issued October 24, 1969, by the Office of Federal Contract Compliance re-delegates certain of its responsibilities to 16 departments or agencies, each with designated compliance responsibility relative to equal employment opportunity[7]. Order No. 1 states in part: "2. Action.—a. The agencies listed herein below are designated as compliance agencies. Other agencies, not so listed, are hereby relieved of any compliance responsibilities under the Executive Order [11246].", Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4380. The Office of Federal Contract Compliance

---

[6] Order No. 15-68 states in part (33 F.R. 12600-1):

> Under the general direction of the Secretary * * * the Office of Federal Contract Compliance (EEO) is hereby delegated authority and assigned responsibility for: * * * Carrying out * * * Parts II, III, IV of Executive Order No. 11246 as amended by Executive Order No. 11375 * * * Developing and recommending to the Secretary rules and regulations necessary or appropriate to achieve the purposes of * * * 11246 * * * 11375 * * * Coordinating with the Equal Employment Opportunity Commission and the Department of Justice on matters relating to Title VII * * * and maintaining liaison with other agencies having civil rights and equal employment opportunity activities * * *.

[7] The departments and agencies are: Agency For International Development, Department of Agriculture, United States Atomic Energy Commission, Department of Commerce, Department of Defense, General Services Administration (whose industries include electric, gas and sanitary services, holding and investment companies), Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior (whose industries include mining and oil, petroleum, refining and related industries and pipeline transportation), National Aeronautical and Space Administration, Post Office Department, Department of Transportation, Tennessee Valley Authority, Department of the Treasury, Veterans Administration and the Environmental Protection Agency.

and the Equal Employment Opportunity Commission, on May 20, 1970, 35 F.R. 8461, entered into a Memorandum of Understanding "* * * to reduce duplication of compliance activities and to facilitate information exchange * * *."

The Office of Federal Contract Compliance Implementing Rules and Regulations under Executive Order 11246, are set forth in Title 41, Code of Federal Regulations, Chapter 60, Part 60-1, Obligations of contractors and sub-contractors, Part 60-2. Affirmative action programs, Part 60-3, Employee testing and other selection procedures, Part 60-5, Washington plan, Part 60-6, San Francisco Plan, Part 60-7, St. Louis plan, Part 60-8, Atlanta plan, and Part 60-20, Sex discrimination guidelines[8]. The Implementing Rules and Regulations of the Equal Employment Opportunity Commission are set forth in Title 29, Code of Federal Regulations, Chapter XIV, Part 1600, Employee responsibility and conduct, Part 1601, Procedural regulations, Part 1602, Records and Reports, Part 1604, Guidelines on Discrimination because of sex, Part 1605, Guidelines on Discrimination because of religion, Part 1606, Guidelines on Discrimination because of national origin, Part 1607, Guidelines on Employee selection procedures, and Part 1610, Availability of Records[9]

The foregoing matters we believe, effectively demonstrate why this Commission does not have the responsibility pursuant to Executive Order Nos. 11246 and 11375, as alleged by petitioners.

---

[8] Office of Federal Contract Compliance Order No. 14, issued January 14, 1972, sets forth proposed new procedures to standardize compliance reviews of employment in Federal contract areas. Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4345.

[9] See also, Regulations of the Department of the Interior and of the General Services Administration, pursuant to their assigned responsibilities under Title VI of the Civil Rights Act of 1964 (Interior), 43 CFR Parts 17 and 17a, and (GSA), 41 CFR Subpart 101-6.2. Accommodations between Federal Labor and Civil Rights Laws are discussed in Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 5063.

Petitioners also cite the Fifth Amendment to the Constitution in support of their claims. We find nothing in the Constitution or the judicial interpretations thereof, as would support Commission regulation of utility employment practices. That which the Constitution does require, this Commission is now doing. No governmental action which this agency takes denies any person of equal protection of the laws. See *Moose Lodge No. 107* v. *Irvis, et al.*, —— U.S. ——, decided June 12, 1972, Slip Op. pp. 8-9, which discusses constitutional protections in the context of the Fourteenth Amendment:

> In 1883, this Court in *The Civil Rights Cases*, 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer*, *supra*, and in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1951).
>
> While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v *Wilmington Parking Authority*, *supra*, at 772.
>
> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley* v. *Kraemer*, *supra*.

This Commission, as pointed out in *Pacific Gas and Electric*, *supra*, 44 FPC 1367-8, does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates, based upon race, sex, color, creed or national origin; does not permit its

hydroelectric licensees owning or operating multiple purpose reservoirs to discriminate in the use thereof, based upon race, sex, color, creed or national origin; and has affirmatively spoken out in respect to the need for all utility suppliers to fully implement the Nation's policy respecting elimination of discrimination in employment. Thus, where this agency takes "State action" within the meaning of Constitutional considerations, its processes do not deny equal protection of the laws either by reason of any Commission rule, regulation or order or by reason of enforcement of a private discriminatory action.

Petitioners' references to actions of the Federal Communications Commission and the Public Service Commission of the District of Columbia, are not persuasive in the interpretation of the provisions of Federal Power and Natural Gas Acts. Both are legally distinguishable. The Federal Communications Commission, the one Federal administrative utility regulatory body which has promulgated regulations in the area of equal employment practices of its regulatees of the general type petitioners seek, did so following judicial interpretation of one of the basic statutes which it administers, the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, *Office of Communications of the United Church of Christ, et al.* v. *F.C.C., et al.*, 359 F.2d 994, 1003, 1006 (CADC, 1966)[10]. The Court recognized two basic concepts of that Act with a nexus to employment practices, the "fairness

---

[10] As petitioners note, the Interstate Commerce Commission initiated a rulemaking inquiry on May 6, 1971, to consider whether there is discrimination in carriers' employment practices, whether laws are being violated, whether that Commission has jurisdiction to deal with the matter, and what action the Commission should take if it has jurisdiction, Notice of Proposed Rulemaking, Ex-Parte No. 278, 36 F.R. 10741. The Securities and Exchange Commission, by Release Nos. 5170 and 9252, July 19, 1971, called attention to disclosure requirements in SEC forms as to civil rights legal actions affecting the security registrant's business activities, such as loss of government contracts or civil rights enforcement activities. The Federal Home Loan Bank Board Regulation referred to by petitioners, April 21, 1972, 37 F.R. 8436, is an exercise of responsibility which that agency has by reason of *inter alia*, Title VIII, Fair Housing, Public Law 90-284, 82 Stat. 73, 81.

doctrine" and the "public reaction to programming test" [11], neither of which are reflected in the Natural Gas or Federal Power Acts. The Communications Commission, by orders released March 29, 1972, 37 F.R. 6586, February 12, 1971, 36 F.R. 3119, August 11, 1970, 35 F.R. 12892, and June 3, 1970, 35 F.R. 8825, adopted reporting regulations requiring cable television operators, communications common carriers and broadcast licensees or permittees to affirmatively show non-discrimination plans in employment practices and to complete annual reporting thereon. Through Notice of Proposed Rulemaking re-

---

[11] Both tie to program content of mass communication media and relate to the bases upon which the FCC assesses the public performance of media facility owners under its licensing procedures, that in contradistinction to direct governmental control of programming. See Memorandum Opinion and Order and Notice of Proposed Rulemaking of the Federal Communications Commission released July 5, 1968, the initial order of that Commission in a series of actions, 33 F.R. 9960, 9961-2, which states in part:

> 9. * * * there is consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the national policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard —the situation clearly parallels the Federal policy in contract awards.
>
> * * * *
>
> 11. The same question is raised when a substantial charge is made that a licensee is deliberately discriminatory in his employment policies. A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts.

leased June 28, 1971, that Commission initiated inquiry into proposed regulations relative to discrimination based upon sex as a part of that Commission's administrative law, 36 F.R. 12542. A rule was adopted and released on December 21, 1971, 36 F.R. 25012.

The action of the District of Columbia Public Service Commission in respect to equal opportunity employment practices of its regulatees, *Re Potomac Electric Power Company*, 83 PUR 3d 113, 147-8, 152-8 (1970), 84 PUR 3d 236, 246 (1970), rests upon specific authority in that Commission. This includes statutory provisions governing that agency, 43 DC Code 303, general federal law, Civil Rights Act of 1964, Executive Order No. 11246 and general police regulation, District of Columbia Commissioners Order No. 65-768 [12]. That Commission is currently considering this subject in relation to the Potomac Electric Power Company. See, PSC-DC, Formal Case No. 576, In the Matter of Investigation of Employment Practices of the Potomac Electric Power Company.

Recent cases before the California Public Utilities Commission have established that the PUC does not have jurisdiction over such employment practices of regulated entities, *NAACP et al* v. *All Regulated Public Utilities et al.*, Cal. P.U.C. Decision No. 77781, dated October 6, 1970, petition for writ of review denied the State Supreme Court unreported order, April 29, 1971; and *Re Pacific Gas & Electric Company*, 87 PUR 3d 270, 312 (1971). In substance, the California Commission found minority hiring practices to be a matter not within the scope of the state utility laws, but, rather, under the State Fair Employment Practice Act.

Petitioners refer to various state fair employment practice laws. We do not find regulatory jurisdiction in this

---

[12] 43 DC Code 303 states: "The Commission shall have power * * * to require and compel every public utility to comply with * * * all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility." DC Commissioners Order No. 65-768 (D.C. Police Regulations, Article 47, Section 4), is a general police regulation prohibiting employment discrimination based upon race, color, religion, national origin or sex.

Commission based upon those provisions. Moreover, as noted, *supra*, even the Equal Employment Opportunity Commission must defer to state agencies having jurisdiction in this area under an exhaustion of remedies principle.

We wish to make clear that should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforcement thereof as a matter of highest priority. We indicated in *Pacific Gas and Electric Company, supra*, 44 FPC 1368, our full commitment to "* * * the national policy that discrimination in employment is to be eliminated by all elements of our society, public and private. * * *".

Limitations of the Proposed Rule—As will be apparent from an examination of the rule as proposed by petitioners, the processing of any complaints thereunder before an agency such as this Commission, which must observe the requirements of the Administrative Procedure Act and general public disclosure procedures, 5 U.S.C. 551 *et seq.*, would inevitably do violence to the non-public disclosure principles of the Civil Rights Act, 86 Stat. 104, 42 U.S.C. 2000e-5(a), 78 Stat. 264, 42 U.S.C. 2000e-8(e). Complaints of discrimination under Section 9 of the proposed rule, or Section 10 intervenor actions, would be public information under this agency's procedures, 18 CFR 1.36(c). Charges of discrimination are not public under the Civil Rights Act, 86 Stat. 104. Similarly, a general public disclosure of annual employment reporting data (EEO-1), pursuant to Section 6 of the proposed rule, would appear to transcend the nondisclosure principle of the Civil Rights Act, 78 Stat. 264.

Additionally, the proposed rule transcends basic legal requirements of the Federal Power and Natural Gas Acts. The statutory bases upon which this Commission must judge particular applications are set forth in the two Acts. Section 11 of the proposed rule would have that judgment accomplished basically in accordance with standards of the Civil Rights Act and general public interest concepts. Also, the penalty and enforcement provisions of the Natural Gas and Federal Power Acts, 15

U.S.C. 717s, 717t, 16 U.S.C. 825m, 825n, 825o, relate to proscribed conduct under those Acts. Section 14 of the proposed rule is directed to other laws. Section 15 of the proposed rule presents a similar legal difficulty in respect to appellate review procedures. Natural Gas and Federal Power Acts, 15 U.S.C. 717r, 16 U.S.C. 8251. Section 13 of the proposed rule assumes authority in this Commission to provide counsel fees. This agency does not have such authority. See, *Power Authority of the State of New York*, Order Denying Motions and Appeals, —— FPC ——, issued October 29, 1971 (mimeo. ed., pp. 3-4).

Administratively, the rule, as proposed, would be duplicative of established procedures which now operate throughout the Nation in respect to equal employment opportunity. These procedures are as outlined, *supra*. The Department of Justice has instituted a number of enforcement actions under those procedures. See, for example, *United States* v. *Louisville Gas and Electric Company*, United States District Court for the Western District of Kentucky, Civil Action No. 7312-G, order June 30, 1972; *United States* v. *Piedmont Natural Gas Company*, United States District Court for the Western District of North Carolina, Civil Action No. 72-128, order June 15, 1972; *United States* v. *Virginia Electric and Power Company, et al.*, 327 F.Supp. 1034 (1971), 4 EPD Paragraph 7502 (1971); and, *United States* v. *Georgia Power Company*, 3 EPD Paragraphs 8143, 8318 (appeal pending USCA5, No. 71-344).

To adopt the proposed rule would (a) make the criminal penalties of the Natural Gas Act, 15 U.C.C. 717t, and the Federal Power Act, 16 U.S.C. 825o, apply to violations of whatever employment codes were adopted by the Commission, and there is no indication of Congressional intent for this result; (b) make the determination of a violation subject to administrative hearings rather than through trial in court, and the 1972 Act makes clear that the Congress intended a judicial, not an administrative, forum, pp. 10-11, *supra*; (c) make the determination of a just and reasonable rate turn on employment practices rather than upon adequate

and reliable service to consumers at the lowest reasonable rate. In our view, Congress has not indicated that consumers should pay higher rates to companies which have FPC approved employment plans and lower rates to companies which do not; (d) make the determination of whether new facilities to supply needed energy to all citizens can be licensed turn upon the question of whether the company proposing the facilities has an FPC approved employment plan. Conversely, facilities already supplying needed energy would presumably be shut down as a sanction for violation of an FPC approved employment plan. There is no indication that Congress intended such a result; and (e) make a further proliferation of agencies having concurrent jurisdiction at a time when Congress had made clear its intent to coordinate such activities. This agency could not "coordinate" with other agencies on cases which are controlled by the Administrative Procedure Act.

Thus, we conclude that the primary jurisdiction over labor and employment practices lies in other agencies, as petitioners recognize when their proposed rule calls for the FPC to defer to EEOC; we conclude that that jurisdiction is exclusive in those agencies. We further conclude that neither the Natural Gas Act and Federal Power Act delegate authority to FPC to regulate employment practices, and that we hold that since there is no jurisdiction to adopt such a rule, no purpose will be served by noticing such a rule for consideration for adoption in advance of a declaratory judgment determining the jurisdiction of the Commission.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h to order as hereinafter provided.

The Commission orders:

The petition, as described above, is hereby dismissed for lack of jurisdiction.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX A

Rule As Annexed to Petition Filed With the Federal Power Commission June 22, 1972

Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power

Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and

control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen

to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of

complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permissions to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

FEDERAL POWER COMMISSION
Washington, D.C. 20426
Equal Opportunity Employer

PRINTED MATTER

[SEAL]

FEDERAL POWER COMMISSION
Postage and Fees Paid

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PETITION FOR REHEARING

of

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Educational Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communication of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

Come now the above named petitioners and, pursuant to section 1.34 of title 18 of the Code of Federal Regulations, subsection (a) of section 717r of title 15 of the United States Code, and subsection (a) of section 8251 of title 16 of the United States Code, petition the FEDERAL POWER COMMISSION for a rehearing of the above numbered and captioned proceeding.

WHEREAS, on or about July 11, 1972, the Federal Power Commission issued an order dismissing the petition in this proceeding for lack of jurisdiction; and

WHEREAS, the grounds for this petition for rehearing are that the Federal Power Commission, in finding that it lacked jurisdiction over the issue of employment discrimination by its regulatees, erred as to matters of law; and that the Federal Power Commission, in denying petitioners' request for hearing and the opportunity to present oral argument, erred as a matter of law; and

WHEREAS, such errors of law include the Federal Power Commission's findings that (1) it lacks the requisite delegation of Congressional authority to act in the area of discrimination in the employment practices of its regulatees, (2) public interest considerations do not enfold the national policies against discrimination in employment, (3) nothing in the Constitution or the judicial interpretations thereof supports Commission regulation of discriminatory utility employment practices, and (4) jurisdiction over discriminatory employment practices lies exclusively with agencies other than the Federal Power Commission; and

WHEREAS, since the issuance of the Federal Power Commission's order of July 11, 1972, in this proceeding, the Chairman of the United States Equal Employment Opportunity Commission in a letter to the Chairman of the Federal Power Commission has communicated EEOC's desire to participate in any formal proceedings arising out of this petition; and

WHEREAS, such desire on the part of EEOC negates the finding by the Federal Power Commission that no purpose will be served by noticing petitioners' rule for consideration for adoption, in that a hearing will serve the purpose of allowing a sister agency of the United States government the opportunity to comment on the issues here presented.

NOW, THEREFORE, the petitioners respectfully pray the Federal Power Commission to REHEAR the petition which is the subject of this proceeding.

Respectfully submitted,

PETITIONERS,

by _____

WILLIAM L. TAYLOR

by _____

RAYMOND M. MARCIN

Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

Their Attorneys

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

VERIFICATION OF PETITION FOR REHEARING

District of Columbia :
: ss.
City of Washington :

July —, 1972

William L. Taylor, an attorney duly licensed to practice law in the District of Columbia and representing the petitioners herein, being duly sworn, deposes and says that he has read the foregoing petition for rehearing and know the contents thereof to be true, except as to matters and things, if any, stated on information and belief, and that, as to those matters and things, he believes them to be true.

WILLIAM L. TAYLOR

Subscribed and sworn to before me this — day of July, 1972, in the city of Washington, D.C.

Notary Public

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

July 13, 1972

[SEAL]

OFFICE OF
THE CHAIRMAN

Mr. John N. Nassikas
Chairman
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Dear Mr. Nassikas:

It is with great interest that I noted the filing on June 22, 1972, of a petition by 12 public interest groups requesting the Federal Power Commission to initiate rulemaking proceedings to require the regulated utilities industry to maintain equal employment opportunity in all its procedures and practices. I fully support the proposals contained in the petition and urge you to initiate rulemaking proceedings to allow all interested parties a chance to express their views on this issue.

The presence of discrimination in the utilities industry is a matter of public record. In a report issued by this Commission on the utilization of minorities and women in the utilities industry, we found that employment discrimination was pervasive throughout the industry.[1] Similarly, in a recent study, Professor Bernard E. Anderson of the Wharton School of Finance and Commerce concluded that little progress has been made by govern-

[1] EEOC, *Employment Patterns in the Utilities Industry*, 1966-67.

ment agencies to eliminate employment discrimination in the industry.[2]

In November of last year, this Commission held public hearings to ascertain whether the utilities companies utilization of minorities and women accorded equal employment opportunity. The conclusions reached as a result of the information provided during these hearings were that there exists pervasive, industry-wide discrimination in all areas of employment. For example, it was determined that the utilities industry employs fewer minorities and women than the average employed by all employers in the Nation. This underutilization is the result of discriminatory employment practices.

The issue of the employment practices of the utilities industry was again raised this year by the House Committee on the Judiciary.[3] Coincident to the hearings, the U.S. Department of Justice, the U.S. Commission on Civil Rights, and this Commission expressed the view that the FPC should undertake regulation of the employment practices of the regulated utilities industry.[4] The Federal Communications Commission has already instituted rules and regulations to regulate the employment practices of the Communications industry,[5] and the Interstate Commerce Commission is presently engaged in rulemaking to decide its role in regulating the employ-

---

[2] B. Anderson, *The Negro In The Public Utility Industries* Univ. of Pa. Press 1970).

[3] *See*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights," Hearings before the Civil Rights Oversight Subcommittee of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. (1972).

[4] *See* Letter from David L. Norman, Assist. Attorney General for Civil Rights, U.S. Dept. of Justice, *id.* at 65; letter from Rev. Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, *id.* at 123; letter from William H. Brown III, Chairman, Equal Employment Opportunity Commission, id. at 121.

[5] *See* 23 F.C.C. 2d 430 (1970) (broadcast rules); 24 F.C.C. 2d 725 (1970) (Commoncarrier rules); 34 F.C.C. 2d 186 (1972) (cable television rules).

ment practices of the surface transportation industry (Ex Parte No. 278).

I sincerely hope that the Federal Power Commission will similarly undertake to issue proposed rules and regulations to require equal employment opportunity in the regulated utilities industry. The major public policy considerations which are involved in equal employment opportunity require that all segments of the Federal Government responsible for insuring the public interest act to eliminate the undesirable effects of employment discrimination. This Commission would look forward to cooperating with the FPC in this vital area and would be glad to provide whatever assistance you may feel necessary in the development of an equal employment opportunity program for the utilities industry. Our experience during the last seven years in administering Title VII of the Civil Rights Act of 1964 has given us invaluable experience in employment discrimination problems, and some of this information may be very helpful to your agency in this area. We would, of course, also wish to participate in any formal proceeding which may be initiated by the FPC.

If I can be of any further assistance to you in this area, please feel free to call on me.

Sincerely,

/s/ William H. Brown III
WILLIAM H. BROWN III
Chairman

cc: Raymond B. Marcin
Catholic University Law School

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Comissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Pinkney Walker.

Docket No. R-447

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Education Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communications of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

ORDER DENYING PETITION FOR REHEARING

(Issued August 21, 1972)

Petitioners in the above-entitled matter on August 8, 1972, filed a petition for rehearing of Commission Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Employment Practices, issued July 11, 1972. Petitioners annex to their petition a letter of Chairman William H. Brown, III, Equal Employment Opportunity Commission, dated July 13,

1972, addressed to the Chairman of the Federal Power Commission.

The assignments of error and grounds for rehearing set forth in the petition, including Chairman Brown's letter, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 623, or which, having now been considered, warrant any modification of that Opinion. Opinion No. 623 dismissed for lack of jurisdiction a petition filed June 22, 1972.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h, 1, to order as hereinafter provided.

The Commission orders:

The petition for rehearing of Commission Opinion No. 623, issued July 11, 1972, is hereby denied.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Federal Power Commission by depositing 6 copies thereof in the United States mail, postage prepaid and addressed to:

Mr. George W. McHenry, Jr.
First Assistant Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Dated at Washington, D.C. this — day of April, 1973.

WILLIAM L. TAYLOR

SUPREME COURT OF THE UNITED STATES

No. 74-1608

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ORDER ALLOWING CERTIORARI. Filed October 14, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 74-1619 and a total of one hour is alloted for oral argument.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 14, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 74-1608 and a total of one hour is allotted for oral argument.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 587901 132